"Mr. Robinson's book on Gavelkind is a very accurate and excellent law treatise, and generally comprehends everything relative to his subject." (Hargrave's Co. Litt. 10 a, note (3); 171 b, note (5); 175 b, note (4); Petersdorff's Abr. vol. 4, p. 655, note.)

"Mr. Robinson's treatise on Gavelkind is an excellent book, for it not only comprehends whatever is useful in Somner, Taylor, and Lambarde, but contains a full account of both tenure and Custumal; besides which, it is a complete law treatise on these heads, and is of such authority in the Courts, that it is in general referred to by the Judges, as a direction to them to proceed in the knotty and before unknown points of this tenure and custom." (Hasted's Hist. of Kent, vol. 1, p.p. 312, 313, 2nd edit.)

Robert Lyle
Canterbury.

THE

COMMON LAW OF KENT;

OR,

THE

CUSTOMS OF GAVELKIND.

WITH THE DECISIONS CONCERNING

BOROUGH-ENGLISH.

By THOMAS ROBINSON, Esq.,
OF LINCOLN'S INN.

A NEW EDITION,

WITH A SELECTION OF PRECEDENTS OF FEOFFMENTS BY INFANT HEIRS IN GAVELKIND, ETC.

BY

J. D. NORWOOD, Solicitor.

ASHFORD:
HENRY IGGLESDEN, HIGH STREET.

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THE

EDITOR'S PREFACE.

The Editor trusts the present edition will be found acceptable to the Profession. The work heretofore contained much matter which the various alterations in the law have rendered of no practical utility; this portion has been accordingly cancelled, which has considerably reduced the size of the work.

The Editor's additions to the text are inserted within brackets, and his notes are distinguished by being alphabetically numbered. He has added at the end of the work, a selection of precedents of feoffments by infant heirs in gavelkind, and an extract from the Third Real Property Report made in 1832, proposing the total abolition of the custom of gavelkind in Kent.

In conclusion, he begs to state, that no labor has been spared in collecting every decision to be found in the reports and text books bearing on the subject of this treatise, and he has also referred to most of the authorities cited by the Author, which were found to be very correctly cited, and fully to justify the encomium his work has received of being called "an excellent and accurate treatise on Gavelkind."*

ASHFORD, JULY, 1858.

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* See Hargrave's Co. Litt. 10 a, note (3); 171 b, note (5); 175 b, note (4); Petersdorff's Abr. of the Common Law, tit. "Borough-English," vol. 4, p. 655, note; Hasted's Hist. of Kent, vol. 1, p.p. 312, 313, 2nd edit.

THE

AUTHOR'S PREFACE.

THERE being already extant three treatises, whose titles bear a resemblance to the present, the Author thinks it incumbent on him to say something in justification of his troubling the public with one more.

Mr. Somner's Inquiry into Gavelkind is limited to the etymology of the term, and the origin and antiquity of the custom, with a few other speculative points.

Mr. Taylor is content with treating in general of the history and etymology of Gavelkind, without any particular regard to the Kentish customs, to which he was an entire stranger.

Nor can the Author better shew the main design of these two writers to be different from his, than

by making use of their own words: "Many other things," says Mr. Somner at the end of his book, "offer themselves to my discourse, that would treat of gavelkind "to the full; but they are, I take it, mostly points of "common law, which, because they are not only out of "my profession, but besides my intention too, which was, "to handle it chiefly in the historical part, and that no "further than might conduce to the discovery of the *primordia* or beginnings of it, I shall not wade nor engage "any further in the argument, lest I be justly censured "of a mind to thrust my sickle into another man's harvest."

And, in like manner, Mr. Taylor informs the reader in his preface, that "he presents to his view and examination, not a law case on the tenure of gavelkind (for "that would have proved beyond the abilities of one that "confesses himself no lawyer, and professes himself ignorant "in that practice and study), but only the history of it."

To the account of the Kentish customs at the end of Mr. Lambard's Perambulation of that county, the Author owns himself much obliged; and had that judicious writer professed to have treated of them as fully, as the nature of the subject would have permitted, he would not have attempted it after him. But as Mr. Lambard intended his only as a summary account, so it is, perhaps,

too closely confined to the points in the Custumal; and the Author having the advantage to come after him, has had an opportunity of clearing up some matters left doubtful by Mr. Lambard, and of rectifying others that have the appearance of errors. * But to avoid misleading the reader by any mistaken conclusion of his own, he has given the cases distinct where there is any disagreement; and if he has sometimes ventured to give his own opinion where the direct authority of the books is silent, he thinks he need not caution the reader to give no further credit to it, than as it shall appear to him to be reasonable.

He believes he has omitted no case relating to his subject to be found in any book of authority, either ancient or modern. Nor has he confined himself to the cases already in print, but traced the matter higher than the books, and given the reader all that occurs of use concerning these customs in the records of the proceedings before the Justices in *eyre* for Kent, in the reigns of Hen. 3, Edw. 1, and Edw. 2; and before the Justices of assize for the same county, in the times of Hen. 3, Edw. 1, Edw. 2, Edw. 3, and Rich. 2.

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* See post, p.p. 36, 104, 108, 133, 135.

In those of the reigns of Hen. 4 and 5, he found nothing worthy notice. There are likewise, most, if not all the remarkable records of the same nature, to be found amongst those of the King's Bench in the foregoing reigns, and a few in the Common Pleas, which the Author was directed to by the indexes and abstracts of those records in the office; to which, as well as the records themselves, he found easy access, by the indulgence of the gentlemen employed in the custody of them. These make about a fourth of the book, and, he believes, will be thought the most valuable part of it, as they are of an authentic nature, and a fund before unknown, and will be found to furnish much uncommon matter, and to illustrate many points left doubtful on the printed books, and the modern practice of the country.

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ERRATA.

Page 4, note, line 3, *dele* (post bk. 2, ch. 3)
„ „ „ 5, „ (post bk. 2, ch. 3)
„ 5, „ „ 1, „ (post bk. 1, ch. 5)
„ 6, „ „ 17, „ (post bk. 2, ch. 3)

THE CUSTOMS

OF

GAVELKIND.

BOOK I.

CHAP. I.

OF THE ETYMOLOGY AND SEVERAL SIGNIFICATIONS OF THE WORD GAVELKIND.

THE various opinions of the antiquaries concerning the etymology of the word *Gavelkind*, may be comprehended under these two heads:

1st. Such as are founded on the nature of the lands in point of descent;

Or, 2dly, on the nature of the services yielded by the land.

The conjectures of the first kind are three; whereof the most common and vulgar, compounds *gavelkind* of the words *gife eal cyn*, or

Book I.

give all kind; kynd in* *Dutch* signifying a male child. (Lamb. Peramb. $\frac{584}{528}$; and his Glossary to the Saxon Laws, *verbo Terra ex scripto;* Co. Litt. 140; Dodderidge's English Lawyer, 73; Cowel in voce; Nat. Bacon, of Government, quarto ed. 106; Verstegan's Restitution of decayed Intelligence, 57; Daniel's Hist. of England, 38.)

2. Sir H. Spelman, in his Glossary, under the word *gaveletum*, expounds this term a little differently, as derived from *gavel (tributum vel debitum)*, of right belonging or given to, *cyn* or *kynd (soboli pueris vel generi)*. And in like manner it is explained in Minshew's Dictionary, under the word Gavelkind.

Powell's Welsh Hist. edit. 1697, p. 22.

3. Mr. Taylor in his History of Gavelkind, deduces the first part of the name from the ancient British word *gafael*, or according to the English pronunciation, *gavel*, which signifies a *tenure*, pp. 26, 96, from the word *gafaelu*, to hold, p. 92; but is something at a loss to account for the termination, and offers, with some diffidence, two derivations of it, one from the British word *kennedh*, *generatio* or *familia*, and then the compound will import *the tenure of the family*, pp. 132, 147, 150; the other from the Saxon word *gecynde*, kind or sort; and he supposes that "the "Saxons meeting with the British *gavel*, and un- "derstanding it to be their common tenure,

* But Mr. Somner says that *kind*, in that language, signifies all children, whether male or female. [Treat. on Gavelk. p. 6, 2nd ed.]

"added something to express it to their own "apprehensions, which being set together would "signify, and that properly enough, *genus tenu-* "*ræ*," so called by way of eminence, "because "that tenure deserved a denomination of the "highest remark, it being, if not the only, yet "the most eminent tenure among them," p. 134.

But the most natural and easy account, doing least violence to the words, and best supported both by reason and authority, is that which is drawn from the nature of the services. According to this exposition of the term, it is derived from the Saxon word *gafol*, or, as it is otherwise written, *gavel*, which signifies *rent* or a customary performance of husbandry works; and therefore they called the land which yields this kind of service, *gavelkind*, that is, *land of the kind that yields rent.* This derivation, first attempted by Mr. Lambard in his Perambulation, $\frac{585}{529}$, and followed by Philipot, in his Villare Cantianum, p. 2, Mr. Somner warmly espouses, and maintains with great learning; proving by a number of ancient records, that *gafol* or *gavel* was a word of frequent use among the Saxons, and signified not only tribute, tax, or custom, but also rent in general; and that under this term were comprehended all socage services whatsoever, which lie in *render* or *feasance;* the word being compounded with, and applied to the particulars wherein the payment, or performance of the service consisted; as *gavel-corn* signifying corn-rent, *gavel-erth* tillage service, and

Book I.

a multitude of others; and the tenant from whom these services were due was called *Gavelman.* And *gavelkind* is a compound of this word *gavel* and *gecynde*, which is nature, kind, quality, or condition; and therefore the proper signification of the term is land of that kind or nature that yields rent, censual or rent-service land, in contradistinction to knight-service land, which being holden *per liberum servitium armorum* yielded no cens, rent, or service in money, provision, or works. (Somn. c. 1, p. 12, et seq.) So that those lands are in Kent called *gavelkind*, which in other counties are distinguished by the name of *socage.* Mr. Somner's derivation of the word is further supported by the opinions of Mr. Just. Fortescue, in his remarks on his ancestor's Treatise of Monarchy, p. 72, and of Mr. Just. Wright, in his Introduction to Tenures, p. 209. [See Hargr. Co. Litt. 140 a, note (4).]

Somn. 35, 49.

Gavelkind a Tenure. V. Somn. 144, 145.

If this be the true etymology, it is evident that gavelkind, taken in the strictest sense of the word, denotes the *tenure* of the land only,* and

* It occurs in this sense, Litt. sect. 265; Fitz. Barre, 119, Prescription, 52; Rot. Claus. 16 H. 3. m. 14; 17 H. 3. m. 17; 37 H. 3. m. 19. in dorso. (post bk. 2, ch. 3); 3 Ed. 1. m. 2; 39 H. 3. Itin. Kanc. rot. 1. in dorso; 43 H. 3. Itin. Kanc. rot. 13. (post bk. 2, ch. 3); 55 H. 3. Itin. Kanc. rot. 20; ibid. rot. 28; ibid. rot. 5. in dorso; rot. 7. (post bk. 2, ch. 1); rot. 13; rot. 14; rot. 15. in dorso; rot. 38. in dorso; rot. 47. in dorso; rot. 61. in dorso; rot. 62; rot. 76; 7 Ed. 1. Itin. Kanc. rot. 3. in dorso. (post bk. 2, ch. 1); 21 Ed. 1. Itin. Kanc. rot. 1. in dorso. (post bk. 2, ch. 1); rot. 23; rot. 70. (post bk. 2, ch. 1); rot.

that the partibility and other customary qualities are rather extrinsic and accidental to gavelkind, than necessarily comprehended under that term. The ancient charters in Mr. Somner's Appendix, whereby lands are granted *tenendum in gavelekende*, or *ad gavelikendam reddendo*, *&c.* (an expression frequent before the 18th Ed. 1. but not to be met with in any grant since the statute *Quia emptores terrarum*, 18 Edw. 1, st. 1, cap. 1.) are strong and unanswerable instances in support of this opinion; the *tenendum* being the proper and usual place in all deeds for creating a new or specifying the old tenure, and originally inserted for no other purpose.

P. 177, 180, 182, 183, 184.

Other significations of the word.

Our writers of the law indeed have not always attended to the strict and original sense of the word, but in the common language of their books and records from the earliest times, have spoken of gavelkind as a custom; and comprehended under that denomination, the several customs annexed to lands of this tenure in the county of Kent.*

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53. (post bk. 1, ch. 5); 6 Ed. 2. Itin. Kanc. rot. 3; rot. 7. in dorso; rot. 17. (post bk. 2, ch. 1); Mich. T. 13 Rich. 2. C. B. rot. 645. (post bk. 2, ch. 1); Mich. T. 9. Ed. 2. C. B. rot. 240. (post bk. 2, ch. 3); Trin. T. 17 Ed. 3. B. R. rot. 32. (post bk. 2, ch. 2); Trin. T. 12 Ed. 1. C. B. rot. 68. (post bk. 2, ch. 3).

* Not only the custom of partition, of which the instances are so numerous that they need not be cited, but the *special* customs also are constantly pleaded as *customs* of gavelkind:—As 1st. *Tenancy by the curtesy*, in

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And the term has by the modern use acquired still a different signification, more confined as to the properties contained under it, but more extensive in point of place, being generally at this day made use of, to denote the partibility of the land only, exclusive of all other customary qualities; nor is gavelkind in ordinary speech restrained to Kentish lands, but equally and indiffer-

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55 H. 3. Itin. Kanc. rot. 51. (post bk. 2, ch. 1); 7 Ed. 1. Itin. Kanc. rot. 3. in dorso. (post bk. 2, ch. 1); 21 Ed. 1. Itin. Kanc. rot. 41. (post bk. 2, ch. 1); 6 Ed. 2. Itin. Kanc. rot. 17. (post bk. 2, ch. 1); *Wm. le Pede's case*, Ass. in Com. Kanc. 16 Ed. 2. (post bk. 2, ch. 1); *Robert le Pykoc's case*, Ass. in Com. Kanc. 17 Ed. 2. & 19 Ed. 2; *Alex. de Greenhethe's case*, Ass. in Com. Kanc. 15 Ed. 2; *Wm. de Adehullegate's case*, Ass. in Com. Kanc. 19 Ed. 2; Mich. T. 13 Rich. 2. C. B. rot. 645. (post bk. 2, ch. 1); Fitzh. Aid, 129, 144; Co. Litt. 30 a. 2*dly*, *Dower*, Pasc. 4 Ed. 1. C. B. rot. 21. (post bk. 2, ch. 2); Trin. T. 5 Ed. 2. B. R. rot. 4. (post bk. 2, ch. 2); *Joan Helles's case*, Ass. in Com. Kanc. 17 Ed. 2; Mayn. Ed. 2. 284; Trin. T. 17 Ed. 3. B. R. rot. 32. (post bk. 2, ch. 2); 21 Ed. 4. 54 a; *Davies* v. *Selby*, Cro. Eliz. 125; Co. Litt. 33 b. 3*dly*, *Alienation by an infant of fifteen*, 55 H. 3. Itin. Kanc. rot. 90. in dorso. (post bk. 2, ch. 3); Mich. T. 11 Ed. 3. B. R. rot. 133; *Simon Parlebien's case*, Ass. in Com. Kanc. 47 Ed. 3. (post bk. 2, ch. 3); 9 Ed. 3. 38; *Peter Hamon's case*, Ass. in Com. Kanc. 13 Rich. 2. (post bk. 2, ch. 3); 11 H. 4. 33; *and Wardship of infants*, 21 Ed. 1. Itin. Kanc. rot. 35. in dorso; Mayn. Ed. 2. 610; Ass. in Com. Kanc. 7 Ed. 3. rot. 2. (post bk. 2, ch. 3). 4*thly*, *the Father to the bough*, *&c.* rot. claus. 8 Rich. 2. m. 2. (post bk. 2, ch. 4); Fitzh. Prescription, 40; Stath. Abr. tit. Custom. pl. 2; Dyer, 310 b.

ently applied to all partible lands wheresoever they lie.*

* By the opinion of three judges against Wyndham, J. in the case of *Wiseman* v. *Cotton* (1 Sid. 138; S. C. 1 Lev. 80), the *special customs* of Kent are no part of the custom of gavelkind, for that the custom of gavelkind is in other countries and towns, as Ireland, Wales, and many towns in Sussex, scarce two of which places agree in any other custom but that of descent. But the authorities just above cited sufficiently show, that the special customs have always been reputed part of the custom of gavelkind. And with regard to the latter part of this position, that gavelkind is in other countries, it is remarkable, that although the name of Gavelkind has been constantly applied to Kentish lands, from the time of King John to the present, no book or record before the time of the disgavelling statute 31 Hen. 8, c. 3. (on which the question in this case of *Wiseman* v. *Cotton* depended) has given that denomination to partible lands in any other country, though many cases occur concerning such lands; but their uniform language with regard to these is only, *that they are partible and have been parted.* (Vide stat. Walliæ, 12 Ed. 1; Stat. 27 Hen. 8, c. 26. concerning Wales, sect. 35; Stat. 32 Hen. 8, c. 29; Itin. Rotel. 14 Ed. 1. rot. 2. in dorso; Rex. Hil. T. 20 Ed. 3 R. R. rot. 160; Fitzh. Prescription, 53; 2 Ed. 3. 12; 3 Ed. 3. 38; 5 Ed. 3. 64; 8 Ed. 3. 42 b; 9 Ed. 3. 14 b; ibid. 27; ibid. 40 b; 23 Ass. pl. 12; 38 Ed. 3. 22 b.) Which universal conformity of the books and records in applying the term to *Kentish* lands, but never to make use of it as to any others, could hardly have arisen from chance, were the name equally proper to both. Some of the cases go still farther, and make a plain distinction between such partible lands in other counties and gavelkind: As Bracton, lib. 3, 374 a. *sicut in gavelkynde vel alibi ubi terra est partibilis ratione terræ.* And the same expression in Fleta, lib. 6, c. 17. And in *Ralph de Colby's case* (2 Ed. 3. 12), concerning lands of the fee of the *Marshall* in *Norfolk* alleged to be partible, it is

V. Somn. 10, 53.

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The word may possibly occur in the following parts of this treatise, in each of these several senses, according as the tenure, the custom of Kent, or the partibility of lands in other counties, are the subject of the discourse, but still with due care to avoid all confusion or mistakes of the meaning.

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said, that in gavelkind it is not necessary to show an actual partition of the lands, because in gavelkind the tenements are partible by usage of the country, but the fee of the *Marshall* is only in certain towns, where the greater part of the country is at the common law, and therefore necessary to show that the lands had been actually parted. So in 5 Ed. 3. 64 a. it is said concerning lands of the fee of *Gelfy*, pleaded to be partible among the males, that it is not of these tenements as of tenements in gavelkind, for in gavelkind of common right the tenements are partible. And in 8 Ed. 3. 42 b. concerning lands of the like nature in *Saxham* in *Suffolk*, it is held necessary to show between whom they had been parted, for that you cannot draw the tenements out of the common course of law, if you cannot show between whom it was so used, unless you can allege the usage of the whole county, as in gavelkind. These observations impeach not the authority of the case of *Wiseman* v. *Cotton* (suprà) in the point adjudged, for the whole Court agreed, that if the special customs of Kent are part of gavelkind, yet they are not affected by the disgavelling statutes.

V. post bk. 1, ch. 5.

CHAP. II.

OF THE ANTIQUITY AND UNIVERSALITY OF PARTIBLE DESCENTS IN ENGLAND.

BEFORE entering into a particular consideration of the Kentish Customs, I shall treat of the antiquity of the partible descent in England, and shew the several alterations that in process of time it has received.

Of partible descents among the Saxons.

The laws of the Saxons and Danes, collected by Brompton and Lambard,* speak not much concerning the manner of descents among them; yet it seems that commonly their ordinary lands at least, descended to all the children. (Hale's Hist. Com. Law, 219; Parker Ant. Ecl. Brit. 108; Holt, C. J. in *Clement* v. *Scudamore*, 6 Mod. 121; S. C. 1 P. W. 63; [Turner's Hist. of the Anglo-Saxons, vol. 2, p. 181, 2nd edit.;

* Hæreditatem temporibus illis non (quemadmodum apud nos) solus ætate maximus adibat, verum ad filios omnes æqualiter fundus lege veniebat, quod illi *Landesciftan* dixerunt, et Cantii hâc nostra memoria eodem vocabulo *to shift land*, id est, herciscere et fundum partiri, appellant. (Lamb. Gloss. to the Saxon Laws, verbo, terra ex scripto; see Somn. 77; Spelm. of Feuds, 12, 40, 43.)

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Haydn's Dict. of Dates, tit. "Gavelkind."]) For amongst the laws of Canute is this law, No. 68:

"Sive quis incuriâ sive morte repentinâ fuerit intestatò "mortuus, Dominus tamen nullam* *rerum* suarum partem "(præter eam quæ jure debetur Hæreoti nomine) sibi as- "sumito; verum eas judicio suo uxori, *liberis* et cognatione "proximis juste, pro suo cuiq. jure, *distribuito*."

The same inference may be made from the 75th law of the same king, whereby it was enacted, that if a man died fighting in the army, in the presence of his lord, his heriot should be forgiven, and his heirs should succeed in his goods and his paternal lands, and they should be *shifted* or *divided* according to right. (Tayl. on Gavelk. 143; Lamb. Sax. Laws, 125; Seld. Orig. of the Eccl. Jurisd. of Testaments.)

And it was the opinion of Lord Holt, in the case of *Blackborough* v. *Davis* (Salk. 251; S. C. 1 Peere Wil. 50), that by the common law both before and at the conquest, all the children both male and female inherited as well the

* The Saxon word *æhte* comprehends both lands and goods. (Somn. 84.) For at that time, as appears by the 75th law of Canute here cited, the heirs took both; our present distinction between the real and personal estate in point of descent not being then known, nor indeed any where (as it seems) till after the introduction of feudal tenures. Mr. Selden collects from the laws of Hen. 1, and the assize of Clarendon, that in this kingdom the heirs inherited chattels as well as lands, as late as the times of Hen. 1, and 2, and that the law was changed about the time of King John by some act of parliament, though no such is now to be found. (Titles of Honour, part 2, chap. 5, sect. 21.)

real as the personal estate of the ancestor equally and in like proportion.

Which authorities may be sufficient to guard us against the mistake of Brooke Ch. Just. in Plow. 129 b, that among the Saxons the law was, that the eldest alone should inherit, and that this manner of descent is continued from them to us.

Of the state of descents at the Conquest.

As the laws of Normandy divided socage lands among the sons, the conquest introduced no considerable alteration in the general law of the land, with regard to inheritances of this nature; but on the contrary, this course of descent stands confirmed by a law of the Conqueror: *Si quis intestatus obierit, liberi ejus hæreditatem æqualiter dividant.* (Leg. 36; Lamb. Sax. Laws, fol. 167; Seld. in Eadmerum, 184; Somn. 83; Hale's Hist. of the Common Law, 220.)

Right of primogeniture, how first introduced into England.

The right of primogeniture first gained footing in this nation by the introduction of military tenures; it being convenient for the service of the kingdom, to preserve the fee entire, to the intent that the tenant by knight-service, who by his tenure was to attend the king in his wars, might do it with more dignity and grandeur; and the choice fell on the eldest son, as he was soonest able to perform the duties of the fee. (Hale's Hist. Com. Law, 221, 222, 223; *Clement* v. *Scudamore*, 6 Mod. 120; S. C. 1 P. W. 63; 2 Inst. 595; Wright's Tenures, 175.)

It will be impossible to settle the period of this change with regard to knight-service lands,

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till the antiquaries are agreed, whether our military tenures were in use with the Saxons, or were first introduced amongst us by the Conqueror.

But however this be, it seems certain that socage lands remained partible long after the conquest; though indeed we have no exact account of the precise time of the general alteration of descents, with regard to these lands throughout the kingdom; but from the silence of historians it may be concluded, that it was not effected at once, nor by any written law; but seems to have crept in insensibly, and by degrees, in imitation of the descents of knight-service lands; the owners of socage tenements choosing rather to deprive their younger sons, of their customary share of the inheritance, than that their elder son, should not be in a condition to emulate the state and grandeur of the military tenants.

And some inconveniences, suggested to have arisen from the equal division of inheritances among the sons, are supposed to have assisted this change.

"1st. It weakened the strength of the king-"dom; for by the frequent parcelling and sub-"dividing of inheritances, in process of time "they became so divided and crumbled, that "there were few persons of able estates left to "undergo public offices and charges."

"2dly. It did by degrees bring the in-"habitants to a low kind of country-living, and

"families were broken; and the younger sons, "who, had they not had these little parcels of "land to apply themselves to, would have be- "taken themselves to trades, or to civil, military, "or ecclesiastical employments, neglecting those "opportunities, wholly applied themselves to "those small divisions of lands, whereby they "neglected the opportunity of greater advan- "tages of enriching themselves and the king- "dom." (Hale's Hist. of the Com. Law, 221.)

Hen. 1.

In the reign of Henry I., according to the opinion of Lord Holt (*Blackborough* v. *Davis*, Salk. 251; S. C. 1 P. Wil. 50), the females, in case there were males, began to be excluded from the real estate; but the males still inherited equally the socage land. Indeed Lord Hale collects from the 70th law of that king, *primum patris feodum primogenitus filius habeat*, that though the whole land did not then descend to the eldest son, yet it began to look a little that way. (Hist. of Com. Law, 224.) But Mr. Somner in his comment on this law of Hen. 1., printed in Wilkins's Saxon Laws, page 226, interprets the *primum feodum* to be only the *capital messuage* according to Glanville, lib. 7, c. 3, *(infrà)* or what is called in the Grand Custumier de Normandy, c. 26, *Le Chief de Heritage*, for which the younger sons were to have an equivalent out of the rest of the inheritance.

Hen. 2.

But the alteration began to appear more plainly in the time of Hen. 2, for according to Glanville, who wrote in that reign, in order

to entitle the sons to take equally, it was necessary not only that the land should be holden in free socage, but further *quod sit antiquitus divisum.* The whole passage is this:

"Si plures reliquerit filios, tunc distinguitur utrum ille "fuerit miles seu per feodum militare tenens, an liber sock- "mannus. Quia si miles fuerit vel per militiam tenens, "tunc secundum jus regni Angliæ primogenitus filius patri "succedit in totum, ita quod nullus fratrum suorum par- "tem inde de jure petere potest. Si vero fuerit liber sock- "mannus, tunc quidem dividetur hæreditas inter omnes "filios, quotquot sunt, per partes æquales, si fuerit socag- "ium *et id antiquitus divisum;* salvo tamen capitali mes- "suagio primogenito filio pro dignitate æsneciæ suæ, ita "tamen quod in aliis rebus satisfaciat aliis ad valentiam. "Si vero non fuerit antiquitus divisum, tunc primogenitus "secundum quorundam consuetudinem totam hæreditatem "obtinebit; secundum autem quorundam consuetudinem "postnatus filius hæres est." (Glanv. lib. 7, c. 3.)

So that according to this account, it is difficult to say, what was then the common law with regard to descents of socage lands, or whether every person entitling himself to them by inheritance, was not obliged to set out the special custom of the place. The same author indeed, in other parts of his book, speaks of the partibility of these lands more generally, and in such a manner as may induce a belief that it remained the common law at that time: *Plurimum item hæredum conjunctio, mulierum scilicet in feodo militari, vel masculorum vel fœminarum in libero socagio.* (Lib. 13, c. 11.) And in another very remarkable passage, wherein he shews that the law so greatly respected

this equal division among the sons, as not to permit the father, even in his lifetime, to prefer a favourite child to any of the rest, by advancing him beyond his proportionable part:

"Sciendum autem, quod siquis liberum habens socagium "plures reliquerit filios, *qui omnes ad hæreditatem æqual-* "*iter pro æqualibus proportionibus sunt admittendi,* tunc "indistinctè verum est quod pater eorum nihil de hæredi- "tate, vel de quæstu, si nullam habuerit hæreditatem, "alicui filiorum, quod excedat rationabilem partem suam, "quæ ei contingit de totâ hæreditate paternâ, donare "poterit. Sed tantum donare poterit de hæreditate sua "pater cuilibet filiorum suorum de libero socagio in vitâ "suâ, quantum jure successionis post mortem patris idem "consecutus esset de eadem hæreditate." (Lib. 7, c. 1.)

Rich. 1.

Nothing can be affirmed with any tolerable certainty concerning the manner of descents in the reign of Richard I., there remaining little of the judicial records, or other memorials of the law in his time. But it is plain that the right of primogeniture made every day a greater progress, insomuch that in the following reign of King John, it had fairly got the upper hand of the partible descent; which, though not then so entirely discontinued in most parts of the kingdom as at present, yet did not remain the general law of the land as it had formerly been, but the presumption of law then was, as now, that even socage lands (except in Kent), were descendible to the eldest son only, unless it were proved that they had always been departible; for in Mich. T. 2 John (rot. 7, in dorso), *Gilbert de Bevill* brought a writ of right *de rationabili*

King John.

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*parte** against *William* his elder brother for lands in Gunthorpe in Rutlandshire, *quæ eum contingunt de socagio quod fuit patris eorum in eâdem villâ*, William pleaded, *quod socagium illud nunquam partitum fuit nec debet partiri, et hoc offert defendere.* And because *Gilbert* the demandant produced no proof of the partibility, *consideratum est quod* Will'us *eat sine die, &c.*

And the partible lands in Kent stand distinguished from those at the common law, by their present name of *gavelkind* in Pasch. 9, Joh. rot. 7, Kanc., where in assize *William de Valon* the tenant pleads in abatement, *quod dimidia illa carucata terræ est partibilis et* gavelykinde, *et unde* Johannes (the plaintiff) *fratrem habet nomine* Thomam *qui tale et idem jus habet, &c.*; and the like pleading occurs in Pasch. 4 Joh. rot. 6, in dorso, Kanc.

Hen. 3.

And this change of the law is further apparent by Bracton, who wrote in the latter end of the reign of Hen. 3:

"Si liber sockmannus moriatur pluribus relictis hæredibus "et particibus, si *hæreditas partibilis sit et ab antiquo divisa*, "quotquot erunt, habeant partes suas æquales; et si uni- "cum fuerit messuagium, illud integre remaneat primo- "genito, ita tamen quod alii habeant ad valentiam de com- "muni. *Si autem hæreditas non fuerit divisa ab antiquo*, "*tunc tota remaneat primogenito.* Si autem socagium "fuerit villanum, tunc consuetudo loci est observanda; est "enim consuetudo in quibusdam partibus quod postnatus "præferatur primogenito, et e contrario." (Bract. lib. 2, fol. 76.)

* This case is misprinted in Hale's Hist. of Com. Law, 153; the words *Demandant* and *Defendant* being transposed.

And Fleta (lib. 5, c. 9, fol. 313), copies as usual, almost the very words of Bracton.

And it appears by the statute of Wales,* (printed in the old Magna Charta, rot. parl. 12 Ed. 1.), that the common law of descents was in this particular the same in 12 Ed. 1, as it is at present:

"Aliter usitatum est in *Wallia* quam in *Anglia* quoad "successionem hæreditatis, eò quod hæreditas partibilis est "inter hæredes masculos, &c."

The reason of the continuance of gavelkind in Kent.

Having thus pursued the partition of the inheritance from the time of the Saxons, to the discontinuance of it in most parts of England, my next inquiry shall be, how it came to pass, that, notwithstanding this general alteration of the course of descents, the county of Kent disregarding the example of her neighbours, still adheres to the old common law, by retaining the partible descent.

And it is much more easy to lay down negatively what was not the cause of this, than affirmatively what is; it being plain, that the continuance of this custom in Kent stands not in need of a confirmation from the Conqueror, since it was in his time the common law of the kingdom, as appears by his 36th law above mentioned. But it is more difficult to assign the true cause; Mr. Somner finding it easier to refute the fabulous story of the Kentish men's compo-

Ante p. 11.

* It is noticed as an Act of Parliament in 2 Inst. 195; Vaugh. 400, 414; Plow. 126 b; *Calvin's* Case, 7 Rep. 21 b; Hale's Hist. Com. Law, 218.

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sition for their privileges with the Conqueror, by means of the surprise of the moving wood of *Swanscombe*, than to give another account in lieu of that which he has destroyed; confessing that his answer must be but conjectural, neither historians nor records giving light into this matter; but, however, as his supposition seems to be the most probable, I shall insert it here.

"The Kentish men, more careful in those "days to maintain their issue for the present, "than their houses for the future, were more "tenacious, tender, and retentive of the present "custom, and more careful to continue it, than "generally those of most other shires were; not "because, as some give the reason, the younger "be as good gentlemen as the elder brethren, "but because it was land which by the nature "of it appertained not to the gentry, but to the "yeomanry, whose name or house they cared "not much to uphold by keeping the inheritance "to the elder brother." (Somn. 89, 90.)

Litt. sect. 210.

This, I think, may suffice concerning the antiquity of our custom; and the notion that it is the remains of the old common law, is further supported by this, that several of the special customs of Kent evidently spring from the same source, as shall be observed hereafter under their several heads.

Post lib. 2, c. 1, 3, 4.

CHAP. III.

IN WHAT PLACES OUT OF KENT THE CUSTOM OF GAVELKIND MAY BE ALLEGED AND MAINTAINED.

IN discussing the matter of this chapter, it will be necessary to use the word *gavelkind* in the modern signification, as a synonymous term for the *custom of partition;* and taking it for granted that gavelkind may properly exist out of the county of Kent, let us see where the law will suffer it to be set up.

Vide ch. 1.

Where the custom may be supported out of Kent.

And first, a personal prescription to have lands descend according to the manner of gavelkind is not good. (Somn. 44, 46.) For sons are parceners in respect of the custom of the fee or inheritance, and not in respect of their persons (Co. Litt. 176 a; Bract. fo. 374 a); and therefore it must be alleged as the custom of the place, or it cannot be supported.

Neither can this custom be laid in every place; for, "in an upland town which is neither city nor "borough, the custom of *gavelkind* or *borough-* "*english*, cannot be alleged. But these are "customs which may be in cities or boroughs; "also, if lands be within a manor, fee, or seig-

"niory, the same by the custom of the manor, "fee, or seigniory, may be of the nature of "gavelkind, or borough-english." (Co. Litt. 110 b.) *(a)*

The custom of gavelkind may likewise be alleged within a *soke* (Gouldsb. 105), which according to that case, is a precinct to which divers manors come to do suit, and (as a great leet) comprehending divers other courts. According to Fleta (lib. 1, c. 47), *soke significat libertatem, cur' tenentium;* or, as Mr. Somner more accurately expounds it, the Saxon word *soc, soke, socne,* signifies a liberty, privilege, franchise, &c., or the precinct or territory wherein such liberty, &c. is exercised. (Fol. 133, 137.)

The reason of putting this restriction on the custom in point of place, is the inconvenience and uncertainty that might arise, if the usage of every little village were suffered to change the law. [See Hargr. Co. Litt. 110 b, note (2).]

(a) The Copyhold Enfranchisement Act (15 & 16 Vict. c. 51), enacts, that lands enfranchised under that Act, or the Acts therein recited, shall thenceforth cease to be subject to the customs of Borough-English, or Gavelkind, or to any other customary mode of descent. (sec. 34.) But the same section declares, that nothing in the Act shall affect the custom of Gavelkind in the County of Kent.

CHAP. IV.

OF THE MANNER OF PLEADING THE CUSTOM OF GAVELKIND; AND THE DIFFERENCE AS TO THIS BETWEEN KENT AND OTHER COUNTIES, AND BETWEEN THE GENERAL AND SPECIAL CUSTOMS.

Manner of pleading the custom of gavelkind.

As the custom of gavelkind is but local, and not universal, he that would entitle himself by it, must in his declaration, or if he be a defendant, in his plea, make mention of the custom whereon he founds his right to the land; as to say, that the land is of the custom of gavelkind, or, as is the more usual way of pleading, that it is *of the nature and tenure of gavelkind.* (5 Ed. 4, 8 b; Fitzh. Custom, 4; 21 Ed. 4, 57 b; 22 Ed. 4, 32 b; *Ewer* v. *Astwike*, 1 And. 192; Co. Litt. 175 b; [Litt. sec. 265.]) Accordingly, it was determined in *Humphry* v. *Bathurst* (1 Lutw. 754), that the Court could not take notice that lands in Kent were of the nature of gavelkind, without something pleaded, or found in the record concerning it.

Need not be pleaded in a special manner, if the

But, if the lands be in Kent, it is not required that this custom be pleaded in a special and prescriptive manner; for the judges of the com-

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lands be in Kent.

mon law pay a particular respect to the customs of gavelkind and borough-english above all others, by taking notice of the nature of them when they are generally alleged, for they are as a general law. (5 Ed. 4, 8 b*; Fitzh. Custom, 4; 21 Ed. 4, 56 b; Co. Litt. 175 b; *Launder* v. *Brooks*, Cro. Car. 562; *Wiseman* v. *Cotton*, 1 Sid. 138; *Humphry* v. *Bathurst*, 1 Lutw. 754; *Clements* v. *Scudamore*, Salk. 243; S. C. 6 Mod. 120; 2 Ld. Raym. 1024; 1 P. W. 63; [Per Tindal, C. J. in *Crosby* v. *Hetherington*, 4 Man. and Gr. 946; Per Denman, C. J. in *Doe* v. *Clift*, 12 Ad. and Ell. 578.]) And, therefore, in demanding gavelkind land, a man need not prescribe in certain, and shew that the town, borough, or city in Kent, where the lands be, is an ancient town, borough, or city, and that the custom has been there time out of mind, that lands within the same town, borough, or city, should descend to all the heirs males; but it is sufficient to shew the custom at large, and to say that the lands lie in Kent, and are of the nature of gavelkind. (Lamb. Peramb. $\frac{595}{538}$.)

Such therefore is the diversity between a general mention of the custom, and no mention at all; nor is there any book to the contrary of this, but Godb. 55. where it is said, that in the prescription of gavelkind, the party ought to

* Where the book is misprinted, *nemi* being left out before the word *prescribe*, as is agreed in *Wiseman* v. *Cotton*. (1 Sid. 138; S. C. Raym. 77.)

shew that the land is *partible, and has been parted.*

But this is certainly not law, unless it be confined merely to such lands of this nature, as lie *out* of the county of Kent; in which places indeed the plea ought to run, that the land within the fee, &c., *à toto tempore, &c. partibilia fuerunt et partita, &c.* as being against common right; and the customary and actual partition is necessary to be pleaded as well as proved (Somn. 48, 53; *Randal* v. *Writtle*, 3 Keb. 216, per Hale, Ch. J.); and 2 Ed. 3, 12, concerning the lands of the fee of the Marshal in Norfolk; 5 Ed. 3, 64, concerning lands within the fee of Gelfy; 8 Ed. 3, 42 b, concerning lands lying in Saxham (near Bury) in Suffolk of the fee of Perting; and 9 Ed. 3, 40 b, of lands within the fee of Richmond are accordingly; in all which cases, the parties were compelled to shew between whom the tenements had been parted, for that otherwise they could not draw them out of the course of the common law, *except in gavelkind*, where it is the usage of the whole county, and the tenements are departible of common right. Indeed in 9 Ed. 3, 27, it is holden not to be necessary to aver the actual partition; because having said that the lands are partible, it is the same thing, the partibility being a consequence of their having been actually parted. And it seems the actual partition need not be pleaded in the very lands in question, though out of the county of Kent, but it may be sufficient if shewn

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in other lands of the same nature within the fee, &c. (Vide Fitzh. Prescription, 53; Bro. Custom, 66; 2 Ed. 3, 12; 3 Ed. 3, 38; 5 Ed. 3, 64; *Robert le Chapeleyn's* case, Itin. Rotel. 14 Ed. 1, rot. 2, in dorso, rex.)

Customs of gavelkind and borough english cannot be traversed.

From the judicial knowledge of our custom it follows, that if heirs in gavelkind bring an action ancestral, and declare on the custom, it cannot be traversed that there is no such custom as gavelkind, for it is the common law where it is used; and it is of record, and known at the common law, and therefore twelve men shall not make trial of it. So, borough-english is in divers towns; and, therefore, a man shall not traverse that there is no such custom as borough-english, for it is a custom by the common law. (Long Quinto, Ed. 4, 31 a; 22 Ed. 4, 32 b.)

But this general doctrine, that the courts of law will take notice of the customs of gavelkind, though not specially pleaded, must be taken with a distinction; for the better understanding of which, as well as for the order of the following parts of this treatise, it will be necessary to divide the customs incident to Kentish gavelkind lands into,

1. The *general*,
2. The *special* customs of gavelkind.

Customs of gavelkind, general and special.

Or, according to the more prevailing notion at this day, into

1. Such as are *parcel of* and comprehended under the name of Gavelkind.
2. Such as are *collateral* to Gavelkind.

The first are such as, according to the opinion of the judges in the case of *Wiseman* v. *Cotton* (1 Sid. 138; S. C. 1 Lev. 80), are absolutely requisite and essential to the nature of these lands, as is partibility among the males; which of itself, say they, will constitute gavelkind, and without which it cannot exist. The *special* or *collateral* customs, are such as are not necessary to the essence of gavelkind, nor, as they think, properly included under that term, and without which it obtains in many places; but are certain customary privileges annexed to all lands of this nature within the county of Kent, and are now as follow: 1. That the husband shall be tenant by the curtesy of a moiety, whether he has issue or no. 2. That the wife shall be endowed of a moiety. 3. The customary wardship of the infant, and that he shall have power to alien his lands as soon as he is out of that custody. 4. The father to the bough, and the son to the plough.

Ante, p. 7.

The propriety of this division, and the use now intended to be made of the distinction, viz.—That the courts of law take judicial notice only of the general, and not of the special qualities, may be collected from the cases of *Launder* v. *Brooks* (Cro. Car. 562); and *Wiseman* v. *Cotton*. (1 Lev. 79; S. C. 1 Sid. 137, 138; Raym. 76.)

Courts of law take notice only of the general, and not of the special customs of gavelkind.

Post, ch. 5.

In both which, as also in the case of *Browne* v. *Brookes* (2 Sid. 153), it is holden, that though it be sufficient for him, that would entitle him-

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self to lands by descent, according to the custom of gavelkind, to say, that the land is in Kent, and of the nature of gavelkind, because the common law takes notice what the custom is; yet the courts of law cannot take cognizance of the particular customs incident to Kentish gavelkind, (as the custom to have dower of a moiety, or to be tenant by the curtesy without issue, &c.) unless they are specially pleaded, as from time whereof, &c.

And Holt, Ch. J. in *Clements* v. *Scudamore* (Salk. 243), says the same of special customs in borough-english lands, that they must be pleaded by those that would take advantage of them, and must be taken by the court to be as they are set forth by the pleading, and not otherwise.

CHAP. V.

WHAT LANDS AND TENEMENTS IN KENT ARE OF THE NATURE OF GAVELKIND: OF THE EFFECT OF THE ALTERATION OF THE TENURE, AND OF THE DISGAVELLING STATUTES.

All lands in Kent presumed to be gavelkind.

As the special usages and laws of particular places, tend in the instances wherein they prevail, to defeat the course of the common law, the general rule is, that the proof of a custom is turned upon him that would take advantage of it; but it is a peculiar favour allowed by the courts of law to this custom, that all lands whatsoever, lying in the county of Kent, shall be presumed to be of the nature of gavelkind, till the contrary be made to appear. (2 Ed. 3, 12; 3 Ed. 3, 38; 8 Ed. 3, 42; 5 Ed. 3, 64; *Gouge* v. *Woodwin*, Mich. T. 8 Geo. 2, 1734. B. R., at a trial at bar upon an issue whether lands parcel of the manor of Dartford in Kent, were of the nature of gavelkind; *Wiseman* v. *Cotton*, 1 Sid. 138; *Browne* v. *Brookes*, 2 Sid. 153; *Randal* v. *Writtle*, 3 Keb. 216; [*Willis* v. *Lucas*, 1 P. W. 475; *Burridge* v. *Sussex (Earl of)*, 2 Ld. Raym. 1292; *Preston* v. *Jervis*, 1 Vern. 325.]) *(b)*

(b) But see ante, p. 21.

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And this is the reason, why the books call gavelkind by a higher appellation than is given to any other custom, the COMMON LAW OF KENT. (*Gouge* v. *Woodwin*, Mich. T. 8 Geo. 2; Lamb. $\frac{595}{538}$; 5 Ed. 4, 8; Somn. 44.)

V.ante,p.23.

But the same favour is not allowed to gavelkind in any other county, but it lies upon the party to prove a customary partition in the place. (Somn. 53; *Randal* v. *Writtle*, 3 Keb. 216, per Hale, Ch. J.) For in no county of England, lands at this day be partible among the males of common right, saving in Kent only. (3 Ed. 3, 38; Co. Litt. 140 a.)

The presumption therefore being thus, it is natural to enquire how the contrary may be proved; and that will appear by shewing what lands really are of the nature of gavelkind, and what not.

All ancient socage lands in Kent are gavelkind.

As to this, it is certain that all lands in the county of Kent, which were *anciently* and *originally* holden in socage tenure, are of the nature of gavelkind. (Lamb. Peramb. $\frac{587}{531}$; Somn. 50, 90; 9 H. 3, Fitzh. Prescription, 63; *Kirby Lee's* Case, Palm. 163.)

Actual partition not necessary.

Mr. Somner, p.p. 49, 50, and Mr. Lambard in his Peramb. p. $\frac{593}{538}$, are both of opinion, that gavelkind in this county is to be tried by the manner of the socage services, and not by the touch of some former partition; and that though the land has never been parted in deed, yet if it remains partible in its nature, it may be parted whenever there shall be occasion. (And see Bro. Custom, 66; Fitzh. Prescription, 53.)

Ancient knight-service lands in Kent, not gavelkind.

But all lands, tenements, and fees in Kent, *originally* holden by ancient tenure of knight-service, are descendible to the eldest son only, according to the ordinary course of the common law, and are not of the nature of gavelkind, nor partible by order of this custom. *(c)* (Lamb. Peramb. $\frac{587}{531}$, $\frac{590}{533}$; Somn. 90; Mich. T. 3 Joh. rot. 13, in dorso; 9 H. 3, Fitzh. Prescription, 63; 55 H. 3, Itin. Kanc. rot. 20; Hil. T. 10 Ed. 1, C. B. rot. 27; *De Beggbrok's* Case, 26 H. 8, 4 b; Stat. 31 Hen. 8, c. 3; 2 Inst. 595; *Kirby Lee's* case, Palm. 163; *Wiseman* v. *Cotton*, 1 Sid. 138; Hale's Hist. of Com. Law, 223; *Gouge* v. *Woodwin*, Mich. T. 8 Geo. 2. B. R.) The reason whereof was, that lands and tenements holden by knight-service, which anciently belonged to the nobility and gentry, should not be carried by descent into many hands, whereby the service for defence of the realm should be lost or diminished, and the owners (the lands being thus

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Of knight-service.

(c) On this passage Mr. Sandys remarks, "I am inclined to think that the term, '*ancient* knight-service,' imports such lands only as were held by military tenure, or knight-service, before the year 1189, (the first year of K. Rich. 1.) the date of legal memory; and that '*ancient* socage tenure,' implies all the lands in Kent, which had not been converted into military tenure prior to A.D. 1189." (Consuet. Kan. 241.) But in *Hougham* v. *Sandys* (2 Sim. 154), V. C. Shadwell observed, "In order to make that which is a freehold of inheritance, descend according to the law of Kent, it must have been freehold of inheritance, which could be presumed to have been such at the time of the *Conquest*." And see per Mansfield, Ch. Just. post, note *(e)*.

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divided), become not able to maintain the countenance of their order and degree. (2 Inst. 595.)

As therefore, the right understanding of what is knight-service, cannot but be of use towards discerning what lands in this county, are exempt from the custom of gavelkind, it may not be an improper digression to observe, that a tenure in chivalry was created, not only by an express reservation of some military service, but also if the king had before the stat. 12 Car. 2, c. 24, [which abolished the tenure of knight-service, and converted it into free and common socage], granted lands in fee without reserving any tenure; or, if he had granted the land by express words *absque aliquo inde reddendo*, they had in both cases by operation of law been holden by knight-service *in capite*, for that is best for the king. (*Wheeler's* case, 6 Rep. 6 b; *Lowe's* case, 9 Rep. 123.)

So, if before the stat. 2 & 3 Ed. 6, c. 8, it had been found by office, or since that time, and before the stat. 12 Car. 2, c. 24, on a *melius inquirendum*, that *de quo vel quibus, vel per quæ servitia*, the lands were holden *juratore signorant*, this shall be taken to be a tenure (by knight-service) *in capite*, for the best shall be taken for the king. (*Estwicke's* case, 12 Rep. 135; 2 Inst. 692; [see *Doe* v. *Redfern*, 12 East, 96.])

So, if upon a *melius inquirendum*, it were found to be a tenure of the king, *ut de manerio, &c., sed per quæ servitia ignorant*, this is a tenure by knight-service, as of a manor. (2 Inst. 692.)

No prescription against gavelkind in Kent.

But if the king on his grant reserve a rose

pro omnibus servitiis, this is a tenure in socage. (*Wheeler's* case, 6 Rep. 6 b.)

Seeing therefore that an actual partition of the lands is not necessary to be proved, let us consider what will be the effect of a contrary usage shewn on the other side; and first, whether any particular person can prescribe in a contrary course of descent. And I take it, that a personal prescription, that a man and his ancestors, &c., have time out of mind, inherited socage lands in Kent, by descent to the eldest son, can no more prevail against the common law of the county, than in other shires a contrary prescription by the younger sons, will make the lands descendible according to gavelkind.

V.ante,p.19.

If lands in gavelkind descend, and the eldest son has always entered claiming the whole, so that they never were parted, for that the younger brothers never put in their claim, but they now come to claim; it shall be no plea to say, that the eldest son has always had the whole, *absque hoc*, that the younger brothers never had anything, against the usages which are so general, that lands of the nature of gavelkind are partible. (Mich. T. 16 Ed. 2, Fitzh. Prescription, 52; Lamb. Peramb. $\frac{592}{535}$.)

V. *Robert le Chapelyn's* Case, Itin. Rot. 14 Ed. 1, rot. 2, in dorso, Rex.

No usage in Kentagainst the general custom of gavelkind.

If a personal prescription cannot overthrow the custom, what then will be the force of a contrary usage in any whole town or village within this county (especially if it be not an upland town but a borough), whose socage lands may have always been inherited by the eldest son,

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and the descent in gavelkind never practised there? Mr. Lambard 596, holds, that a city, town, or borough, can no more be exempted for the only default of putting this custom in use, than the eldest son in the case before may prescribe against his younger brethren; and this, he says, was in his time the resolute and settled opinion, not only of the best professors and practisers, but of the justices and judges of the law. *(d)*

Of the effect of the alteration of the tenure from knight-service to socage.

I have confined the description of gavelkind lands in this county, to lands *originally* of socage tenure, for a tenure of this kind newly or lately created, cannot entitle to the benefit of the custom, which in the nature of it must have continued time out of mind; and, therefore, if lands originally holden by military services come into the hands of the crown, and are afterwards granted out again to be holden in socage, this will not reduce them to the nature of gavelkind, but they will remain as before descendible to the eldest son only. (Lamb. Peramb. 591; *Gouge* v. *Woodwin*, Mich. T. 8 Geo. 2, B. R.)

Fitzh. Prescription, 64.

And for the same reason, the statute 12 Car. 2, c. 24, which reduced all military tenures to free and common socage, being made within time of [legal] memory, cannot be said to make all the lands in Kent, holden originally by knight-service, to be now divisible among the males generally,

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(d) The custom of Borough-English has from time immemorial, prevailed in the manor of Westerham in this county. But see ante, note *(a)*.

if the custom of gavelkind never before attached upon them. (*Gouge* v. *Woodwin*, suprà.)

Nor can gavelkind be created, or lands made partible at this day, after the manner of this custom, in derogation of the common law, even by the King's express grant for that purpose; and accordingly it is laid down (37 H. 6, 27 a, and per Coke, 1 Rolle's Rep. 46), that the King cannot by his letters patent, grant that lands shall be of the nature of borough-english, and descendible to the youngest son. For customs receiving their perfection from the continuance of time, come not within the compass of the King's prerogative. (Coke's Copyholder, sect. 31.)

Or from socage to knight-service.

Nor, on the other hand, will every alteration of the socage tenure within time of memory, take away or abrogate the custom; and therefore, it has been adjudged in the King's Bench, that if a man seized of land of the nature of gavelkind, makes a gift in tail to hold of him by knight-service, this land shall be partible notwithstanding. (26 Hen. 8, 4 b.) And by Montague, Ch. J., where land in Kent was holden in socage in gavelkind in the beginning, and now much of it is holden in knight-service, yet the custom of gavelkind remains; for it runs with the land, and is by reason of the land. (Dalis. 12, 23.)

Of the king's power to change the descent of gavelkind lands.

Mr. Lambard says, that if lands of ancient socage-service come to the crown, and be delivered out again to be holden either of the Prince *in capite*, or by knight-service of any

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manor, they ought to descend according to the custom, notwithstanding the tenure be altered. (Peramb. $\frac{5}{5}\frac{9}{3}\frac{1}{4}$; and see Dalis. 23.)

3 Keb. 216, by the same Judge.

And the same is the opinion of Hale, Ch. J. in his Hist. of the Com. Law, 223:—Even in Kent, if gavelkind lands escheat, or come to the crown by attainder, or dissolution of monasteries, and be granted to be holden by knight-service, or *per baroniam*, the customary descent is not changed *(e)*, neither can it be but by act of par-

(e) The case of *Doe* d. *Lushington* v. *The Bishop of Llandaff* (2 Bos. & P. New Rep. 491; S. C. 2 Eag. & You. 557), was decided in conformity with this opinion. It was there determined, that the original tenure of the glebe lands (if there were any), of the Rectory of Rodmersham in Kent, which Rectory had formerly been part of the possessions of the Priory of St. John of Jerusalem in England,* and upon its dissolution, had been granted by King Hen. 8, to one John Pordage, his heirs and assigns *in capite*, by knight-service, had not been altered by their appropriation to the religious house; but that when granted by the Crown, the lands became descendible according to the custom of gavelkind. Ch. Just. Mansfield, in delivering the judgment of the Court, observed, "With respect to any land which may belong to the Rectory, it will fall under a different consideration from the tithe. It is said, that the land is not to be considered as descendible according to the custom, because it had been long in the hands of an ecclesiastical corporation; and that in ancient times, the land might not have been gavelkind when it first came to this body. But I think that it is impossible to distinguish the lands belonging to this Rectory, from other lands in Kent. The law of gavelkind is unlike all other customs, it is not

* Hasted says, that this Rectory was given to the Priory by King Henry 2. (Hist. of Kent, vol. 6, p. 120, 2nd edit.)

liament, for it is a custom fixed to the land *(f)*. And accordingly we see, that those who have

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good if it begins only just before the reign of Richard the First. This custom existed long before any such customs, and almost before any History. In some places it is called the Common Law of Kent. * * * The appropriation in subsequent times (after the Conquest), of any portion of land to a religious house will not alter its tenure. While in possession of the House, it could go to no children, but as soon as it was given up by the religious house, and granted by the Crown, *it must have been holden according to its ancient tenure.* The custom of gavelkind then attached, and, amongst other things, the descent to all the sons equally."

There is, however, in the appendix to Somner on Gavelkind, No. 5, p. 178, 2nd. edit. a record of a suit instituted in 25 Hen. 3, by one *Burga*, late wife of *Peter de Bendings*, against the Prior of the Holy Trinity in Canterbury, which was decided before the Justices itinerant that year (1241), at Canterbury in favor of the Prior; the finding of the Jury in which suit, appears to be at variance with the decision of the Court of Common Pleas in *Doe* v. *The Bishop of Llandaff.*

The suit was intituted by the plaintiff, to recover a moiety of the Manor of Wells, which she demanded as her free-bench, whereof her husband had endowed her. The Prior pleads, "quod habet manerium illud ex dono prædecessorum "Domini Regis, qui illud manerium aliquando tenuerunt. "Et quod illud manerium dederunt Deo et ecclesiæ S. "Trinitatis, adeo liberè sicut manerium illud tenuerunt in "puram ac perpetuam eleemosynam; ita quod, illud mane-"rium nunquam postea partitum fuit, nec est partibile. Et "dicit, quod Dominus Rex qui manerium illud dedit prædе-"cessoribus suis, non tenuit illud nomine Gavelkinde." To this plea the Demandant *(Burga)* replies, "quod prædictum "manerium est Gavelkinde, et partibile, &c.," and tenders issue thereon, which the Prior denies and joins issue. The Jury find "quod prædictum manerium fuit quondam mane-

The Prior pleads, that the King gave the manor to his church, &c. so that it was never afterwards parted, nor partible, &c.

The Demandant replies, that the manor is gavelkind, and partible.

The Jury find

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been inclined to disgavel their lands, have applied to the legislature for that purpose.

Of gavelkind lands in the hands of the crown.

But though the change of the tenure be not a total extinguishment of the custom, yet it is still another question, whether if lands of this nature fall into the hands of the King, who is the sovereign lord of all lands, and who can himself hold by no tenure, this may not cause a temporary suspension of the custom, during the continuance of such unity of possession.

As to this, Mr. Lambard in his Peramb. $\frac{523}{536}$, makes a distinction, "That if lands of the nature "of gavelkind come into the King's hands by "purchase, or by escheat as holden of the manor "of A. which he purchased, after his death all "his sons shall inherit and divide them. But if "they come to him by forfeiture for treason, or "by gift in parliament, so that he is seized of "them *in jure coronæ*, then his eldest son only,

that the manor never was gavelkind nor partible, &c.

Judgment.

"rium Domini Regis. Et quod datum fuit Deo et Ecclesiæ "S. Trinitatis, in liberam, puram, et perpetuam eleemosynam. "Ita quod, manerium illud nunquam fuit Gavelkinde, nec "partitum, nec est partibile, &c." "Ideo consideratum est, "&c. quod Prior teneat, &c. et eat sine die, et prædicta *Bur-*"*ga* in misericordiâ, &c." (See Hasted's Hist. of Kent, tit. "Westwell," vol. 7, p. 412, et seq: 2nd edit.)

(f) In *Minet* v. *Leman* (20 Beav. 269), it was held by the M. R., that where gavelkind lands in Kent, are exchanged for common socage lands in another County, under the provisions of the General Inclosure Act (8 & 9 Vict. c. 118), the tenures of the exchanged lands are not altered. But the Lords Justices on appeal, thought the point doubtful.

"which shall be King after him, shall enjoy "them."

But there is no foundation in law for this distinction; for, whatever way the King attain the possession of lands, as if he purchase lands to him and his heirs, he is seized *in jure coronæ*, and if he purchase lands of the custom of gavelkind, and dies having divers sons, the eldest only shall inherit these lands. (Co. Litt. 15 b; per Twisden, Just. in *Wiseman* v. *Cotton*, 1 Sid. 138; S. C. Raym. 77; *Willion* v. *Lord Berkley*, Plow. 247.)

Nor is it at all strange, that the personal dignity of the King should supersede this custom, since it will cause the same change of the descent in lands at common law; for the eldest daughter or sister of a King shall inherit all his fee-simple lands; as was the case of Queen Mary. (Co. Litt. 15 b.)

But if gavelkind land descends to the King and his brother (which must be understood of a descent from a subject), each of them shall take a moiety; for if the King should take the whole, he would do a wrong to the other, which his prerogative will not extend to. (*Willion* v. *Lord Berkley*, Plow. 247.) *(g)*

Which agrees with the opinion of Moile, Just. (35 H. 6, 28 a), that if lands in gavelkind descend

(g) In a M.S. note by Ch. Just. Hale, to Co. Litt. 15 b, it is said, that purchases made *before* accession of the Crown, or descents from collateral ancestors *after* accession of the Crown, vest in a natural capacity.

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to the King and his brother, the King shall be in the same condition as another person, and he and his brother shall inherit jointly. Wherein is to be noted the diversity between a descent from a subject to the King, and a descent together with the crown.

But the possession of the crown of lands originally gavelkind, and a contrary course of descent by reason thereof, destroys not, but only suspends the custom, and upon a separation by grant of the lands to a subject, it immediately revives, and the lands are again partible among the males. (*Gouge* v. *Woodwin*, Mich. T. 8 Geo. 2, B. R; per Twisden, Just. in *Wiseman* v. *Cotton*, 1 Sid. 138; 2 ibid, 83; per Browne, Just. Lamb. Peramb. $\frac{593}{536}$; and the authorities before cited page 34.)

Tenant cannot alter the descent of gavelkind or borough-english lands.

The owner of lands cannot by his grant, change the course of the descent; for, if a man seized of lands in gavelkind, give or devise them to his *eldest* heirs, he cannot thereby alter the customary inheritance; but the law, *utres magis valeat*, rejects the adjective *eldest.* (Co. Litt. 27.)

And the same law is of borough-english. (Dyer 179 b, pl. 45; [see Dav. 31 a, 36 b; Hargr. Co. Litt. 10 a, note (3); *Roe* v. *Aistrop*, 2 W. Black. 1228.])

Nothing can extinguish the custom of gavelkind

Upon the whole it may be concluded, that the nature of gavelkind land cannot be entirely changed, nor the custom extinguished beyond a possibility of revivor, neither by alteration of the tenure, nor by possession of the King,

nor by the act of the party, nor indeed by any ordinary means, but by Act of Parliament only.

but an Act of Parliament.

Which naturally leads me to consider the statutes made for disgavelling lands in Kent, and the effects of them.

The several statutes made for this purpose are, 31 Hen. 8, c. 3 *(h)*, and six private Acts not printed in the statute books, one in 11 Hen. 7, another 15 Hen. 8, another 2 & 3 Ed. 6, another 1 Eliz., another in the 8th year of the same reign, and the last in 21 Jac. 1.*

The disgavelling statutes and effects of them.

(h) Mr. Hargrave says (Co. Litt. 140 b, note (2), that the stat. 31 Hen. 8, c. 3, is the only disgavelling statute in print.

* The following are the names of those persons, whose lands in Kent have been disgavelled by Acts of Parliament.

11 Hen. 7. [A.D. 1495.]
Sir Rich. Guldeford, Knt.

15 Hen. 8. [A.D. 1523.]
Sir Hen. Wyat, Knt.

31 Hen. 8. [c. 3. A.D. 1539.]
Tho. Lord Cromwell,
Tho. Lord Burghe,
Geo. Lord Cobham,
Andrew Lord Windsore,
*Sir Tho. Cheyne, Knt.
Sir Christ. Hales, Knt.
Sir Tho. Willoughby, Knt.
*Sir Anth. Seintleger, Knt.
*Sir Edw. Wootton, Knt.
Sir Edw. Bowton, Knt.
*Sir Roger Cholmley, Knt.
Sir John Champneys, Knt.
*John Baker, Esq.
Reignold Scot,
*John Guldeford,
*Tho. Kemp,
Edw. Thwaites,
*William Roper,
Anth. Sandes,
Edw. Isaac,
Percival Harte,
Edw. Monyns,
Will. Whetnall,
John Fogg,
Edm. Fetiplace,
Tho. Hardres,
Will. Waller,
*Tho. Wilford,

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The words made use of by the statute 31 Hen. 8, c. 3, are, That all manors, lands, tene-

*Tho. Moyle,
*Tho. Harlakenden,
Godfrey Lee,
*James Hales,
Henry Hussey,
Tho. Roydon.

2 & 3 Ed. 6. [A.D. 1548.]

*Sir Tho. Cheyney, Knt.
*Sir Anth. Seintleger, Knt.
Sir Robt. Southwell, Knt.
*Sir John Baker, Knt.
*Sir Edw. Wootton, Knt.
*Sir Roger Cholmley, Knt.
*Sir Tho. Moyle, Knt.
Sir John Gate, Knt.
Sir Edm. Walsingham, Knt.
*Sir John Guldeford, Knt.
Sir Humf. Style, Knt.
*Sir Tho. Kempe, Knt.
Sir Martyn Bowes, Knt.
*Sir James Hales, Knt.
Sir Walter Hendley, Knt.
Sir Geo. Harper, Knt.
Sir Hen. Istey, Knt.
Sir Geo. Blage, Knt.
*William Roper,
*Tho. Wylforde,
*Tho. Harlakenden,
Tho. Colepepper, of Bedgebury,
John Colepepper, of Ailesforde,
Tho. Colepepper, son of the said John,
Will. Twisenden,
Tho. Darrel, of Scotney,
Robert Rudstone,
Tho. Robertes,
Stephen Darrell,
Rich. Covarte,
Christ. Blower,
Tho. Hendley,
Tho. Harman,
Tho. Lovelace,
Reignald Peckham,
Herbert Fynche,
William Colepepper,
John Mayne,
Walter Mayne,
Tho. Watton,
John Tufton,
Tho. White,
Peter Hayman,
Tho. Argal.

1 Eliz. [A.D. 1558.]

Thomas Browne, of Westbecheworth in Surrey,
Geo. Browne.

8 Eliz. [A.D. 1565.]

Tho. Browne, Esq.

21 Jac. 1. [A.D. 1623.]

Tho. Potter, Esq.
Sir Geo. Rivers, Knt.
Sir John Rivers, Knt.

N.B.—Twelve of the names in the stat. 2 & 3 Ed. 6, [marked thus *] are the same as in the stat. 31 Hen. 8, c. 3.

ments, woods, pastures, rents, services, reversions, and remainders, advowsons, and all other hereditaments whatsoever, lying and being within the county of Kent, of which the persons mentioned in the Act were at that time seized, which then were of the tenure and nature of gavelkind, and before that time had been departed or departible between the heirs male by the custom of gavelkind, should from thenceforth be clearly changed from the said custom, tenure, and nature of gavelkind, and should from that time in no wise be departed or departible by the said custom of gavelkind between the heirs male, but should remain, revert, abide, descend, come, or be, after and according as lands, tenements, &c., do or may descend, remain, &c., according to the common law of this realm, and as other manors, lands, and tenements, being in the said county of Kent, which never were held by service of socage, but then were, and always had been holden by knight-service, do descend, &c., and in like manner to descend, and be descendible, remain, revert, come, and be inheritable, to the heir or heirs, after and according to the said common laws, &c. And that all and singular the said lands, tenements, hereditaments, &c., should from thenceforth be accepted, taken, inherited, deemed, and judged, to be like as lands, tenements, &c., at the common law, &c., and in such manner and form, as if the same lands, tenements, &c., had never been of the said nature of gavelkind; any usage.

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or custom in the said county to the contrary notwithstanding.

And in the statute of Ed. 6, there is a clause, that the lands should be disgavelled, and should from thenceforth be, to all intents, constructions, and purposes whatsoever, as lands at common law, as if they had never been of the nature of gavelkind, and that they should descend as lands at common law, any custom to the contrary notwithstanding *(i)*.

The words of these statutes are very general, to make the lands as if they had never been of the nature of gavelkind, but the construction is more restrained.

Wiseman v. *Cotton.*

In an ejectment for lands in Kent, a question arose, whether lands which had been gavelkind, but were by the stat. 2 & 3 Ed. 6, disgavelled, and made descendible according to the course of the common law, did notwithstanding remain devisable by will, according to the custom of Kent as to gavelkind; and the court after two arguments adjudged, that the statutes of disgavelling only took away the partibility, and not the other qualities or customs appertaining to lands in Kent, of the nature of gavelkind; for that they are merely collateral to the nature of gavelkind (though Wyndham, Just., thought them parts of the custom of gavelkind); and the last clause, that the lands shall descend ac-

(i) In *Wiseman* v. *Cotton* (cited in *Doe* v. *Brydges*, 6 Man. & Gr. 282), a special verdict was found purporting to set out the above Act. See next note.

cording to the common law, shall qualify the generality of the preceding words; and though such custom were to be taken to be parcel of, and comprehended under gavelkind, yet it was not the design of either of these acts, to divest these lands of any of their former privileges, not expressly altered by the letter of these laws; for else, instead of a benefit which the acts intended (they being made on the petition of the persons therein mentioned), the owners of gavelkind lands would suffer a great prejudice by the loss of their former privileges, as in the case of forfeiture for felony and the like. (*Wiseman* v. *Cotton*, Hard. 325; S. C. 1 Sid. 135; Raym. 59, 76; 1 Lev. 79.) And the same opinion had been before declared *obiter* by Glynne, Ch. Just., in the case of *Brown* v. *Brookes* [2 Sid. 153; S. C. nom. *Brooke* v. *Thomlinson*, 1 Freem. 47], concerning the statute 31 Hen. 8, c. 3, that it extends to no other custom of the land, save that of the descent, according to a M.S. note which I have seen of that case, written in the hand of Pemberton, afterwards Ch. Just.

Evidence of the disgavelling acts.

It may be a proper caution to the reader, that all these disgavelling statutes being *particular* acts, the courts of law cannot take judicial notice of them; but if any use is proposed to be made of them, an attested copy examined with the record, ought to be given in evidence (*j*). Indeed, the statute 31 Hen. 8, c. 3,

(*j*) In *Doe* d. *Bacon* v. *Brydges* (6 Man. & Gr. 282),

Book I. being printed in the statute book by the King's printer, according to the modern practice, credit

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the Court of Common Pleas held, that the contents of an office copy of a special verdict, returned upon the trial of a feigned issue, in the case of *Wiseman* v. *Cotton* (suprà), setting forth the provisions of the disgavelling statute 2 & 3 Edw. 6, were inadmissible as evidence to prove the passing of the Act, although the original is not now to be found on the parliament roll. Ch. Just. Tindal, in delivering the judgment of the Court on making the rule absolute for a new trial, said, "In order to prove that such an Act of Parliament did really pass, after the evidence from the Clerk in the Parliament Office, who had the custody of the records of the House of Lords, that no such Act was to be found, a certain calendar was put in, purporting to contain sixty titles of Acts passed in the 2 & 3 years of the reign of Edw. the 6th, of which that which was numbered 40, purported to be, 'An Act for disgavelling lands in Kent.' The calendar so produced was made in 1640. * * * To the reception of this evidence the defendant's counsel objected, but it was nevertheless received. The plaintiffs next produced in evidence, an examined office copy of a special verdict, found in a cause upon a feigned issue between *Wiseman* & *Cotton* Bart., in B. R. Hilary Term, 13 & 14 Car. 2, in which special verdict the jury found, among other things, the Act in question, so alleged to have been lost. To this evidence there was an objection on the part of the defendant. * * * * * As it appears to us, that the objection made to the reception of the special verdict was well founded, and that such evidence was inadmissible, and that upon the ground of its having been received, the cause must go down to another trial, it will be unnecessary to state our opinion upon the other points raised in the course of the argument before us. But with respect to the special verdict which was given in evidence, we cannot distinguish this case from any other in which the general rule obtains. The verdict was strictly and properly '*res*

will be given to it, and it may be read in evidence to a jury as a true copy. (See Salk. 566; [*Dupays* v. *Shepherd*, 12 Mod. 216; Gilbert's evid. 6th edit. p. 10, and note by Sedgwick; Hargr. Co. Litt. 98 b, note (1); *Doe* v. *Brydges*, 6 Man. & Gr. 306, n. (e).])

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inter alios acta,' and could not bind the parties to the present suit, by anything found in such verdict by the former jury. The finding of the jury in that case, is open to the further objection, that it is strictly and properly the finding of a matter of fact; it does not profess to give a copy of the Act according to its tenor, nor does it state any title of the Act, by which alone it could be identified with the lost Act, No. 40 in the Calendar; but it finds only as a matter of fact, that at a Parliament of King Edw. 6th, holden, &c., it was enacted, ordained, and established, by the authority of the same Parliament, in these words following, to wit, &c. It follows, therefore, that the plaintiff must be taken to give in evidence, *the finding of the Jury* in that cause, in order to supply the lost Act; and it is not the case of procuring by some casual means, an authenticated copy of the lost Act out of any custody, as it is argued to be on the part of the plaintiff, even if such production would be admissible. As therefore, it is impossible to say, that the verdict found for the plaintiff, did not proceed on the effect which the production of this special verdict had upon the minds of the jury, we think the case must go down to a new trial."*

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* This cause was tried again at the Spring Assizes for the County of Kent, 1845, when an attested copy of the disgavelling Act, was produced from the possession of Messrs. Pemberton & Co., the solicitors to the Commissioners of Woods, Forests, &c. The Jury returned a verdict for the plaintiff, but a bill of exceptions was tendered on the part of the defendant, as to the admissibility of the copy, and of some other parts of the evidence adduced in the cause.—Note by Man. & Gr. p. 306.

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This may suffice to shew what lands in general are of the nature of gavelkind.

Remainder or reversion of gavelkind land.

It is further to be observed, that a remainder, [or a reversion,] being but the residue of the estate in the land, shall descend in the same manner as the lands in possession. As if the ancestor die, seized of the remainder or reversion in fee or fee-tail, expectant on an estate for life or in tail, this shall be divided among all the heirs male; and such remainder [or reversion] of borough-english lands, shall descend to the youngest son. (26 Hen. 8, 4 b; Bro. Custom, 1; Lamb. Peramb. 548; *Ballard* v. *Ballard*, Dyer, 128; Style, 410; [*Chester* v. *Chester*, 3 P. Wms. 63.])

Use.

The use also of gavelkind land, shall follow the nature of the land out of which it issues, and be partible among all the males, it not being a thing newly created, but the ancient use. And in borough-english, the use shall descend to the youngest son. (1 Rep. 88 a, 101 a; Co. Litt. 23 a; [*Randall* v. *Richill*, 1 Freem. 105, 346.]) And the same it is of a trust. [*Banks* v. *Sutton*, 2 P. Wms. 713; *Fawcet* v. *Lowther*, 2 Ves. sen. 304; *Hinton* v. *Hinton*, 2 ibid, 640; *Jones* v. *Reusbie*, 22 Vin. Abr. 185, pl. 7.] *(k)*

Trust.

(k) Accordingly, if land agreed to be sold be gavelkind, all the sons upon the death of their parent before the completion of the purchase, will become trustees for the purchaser, and as such, bound to carry the agreement into effect. (*Teynham* v. *Head*, cited Sugd. Vendors, 184, 8th edit.; *Hinton* v. *Hinton*, 2 Ves. sen. 640.) So, if gavelkind

Profits of a fair or market.

If a fair or market be holden on gavelkind land, such profits thereof as arise from, or by reason of the soil, shall descend in the same manner as the land would descend by the custom; but such as are independent of the soil, shall go to the eldest son only; as may be inferred from what is laid down by the Court in *Heddey* v. *Wellhouse* (Moor, 474), that if the King grants a fair or market with toll certain,

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land be mortgaged, the equity of redemption on the death of the mortgagor, will descend to all his sons equally, to whom the legal estate would have descended. (*Fawcet* v. *Lowther*, 2 Ves. sen. 304.) And if the mortgagee should die before the land has been redeemed, all his sons will be necessary parties to the reconveyance of the estate to the mortgagor, on his redemption of the mortgage. (*Re Kent*, 8 Law Jour. (N. S.) Ch. 169 ; *Re Field*, 9 Hare, 414.)

But where a trust of gavelkind lands is *executory*, and is to be carried into execution by a Court of Equity, that Court will direct the conveyance to be made according to the rules of the Common Law, and not according to the Custom. (*Roberts* v. *Dixwell*, 1 Atk. 609 ; cited 4 Myl. & Cr. 329.) So, where a surrender was made of an estate of the tenure of borough-english to the use of trustees, in trust, after payment of an annuity, and some particular debts, to surrender the same to the use of the heirs of the body of the husband and wife, who had two sons ; as this was a trust merely *executory*, the Court directed a surrender to be made to the *eldest* son, as heir general by the Common Law. (*Starkey* v. *Starkey*, Bac. Abr. (H) tit. "Uses and trusts.") And in *Hougham* v. *Sandys* (2 Sim. 154), V. C. Shadwell held, that money produced by the sale of gavelkind lands, and impressed with a trust to be laid out in the purchase of other freehold lands, will, upon the death and intestacy of the person entitled to it, descend to the heir-at-law, and not to the co-heirs in gavelkind.

to a man and his heirs, to be holden within land which is borough-english, and the grantee dies, the heir at common law shall have the fair or market with the toll, but the younger son shall have the pickage and stallage, as incident to the soil (*l*). And the same thing was affirmed *obiter* by Bury, Ch. B., in the case of *Rebow* v. *Bickerton* (Trin. T. 7 Geo. 1, in Scacc.), because the former is not annexed to the land, but the latter are incident to the soil.

What rents out of gavelkind follow the nature of the land.

There is no point concerning the law of gavelkind, that has given occasion to a greater variety of opinions than this: Whether a rent issuing out of gavelkind land shall follow the nature of the land or not.

Indeed, the books generally agree, that a rent which has continued time out of mind, is of the nature of the land, and as such, shall be partible among the heirs male, and the wife shall be endowed of a moiety, &c. (4 Ed. 3, 32; Bro. Custom, 58; Fitzh. Dower, 113.)

But this must be taken with a distinction, that it be not rent-service parcel of a manor originally holden by knight-service, which will descend with the manor. [Hargr. Co. Litt. 111 a, n. (5).]

For though the tenancy be of gavelkind nature, yet the rent-service by which such tenancy is holden, may well be descendible at the common law. (7 Ed. 3, 38; Fitzh. Avowry, 150; Lamb. Peramb. 548; 21 H. 6, 11 b.)

(*l*) The decision in this case is cited with approval by Bayley, Just., in *Rex* v. *Bell.* (5 Mau. & Sel. 222.)

Nor does there ever seem to have been any doubt concerning a rent reserved on a gift in tail, or lease for life or years, of gavelkind lands; but as incident to the reversion, it shall follow the nature of the lands. (22 Ed. 4, 10 b; *Knolle's* case, Dyer, 5 b.)

But the great question has been concerning a rent-charge out of these lands commencing by grant within time of memory, which is, however, now put in peace by the following determination:

The question was, whether a rent-charge granted out of gavelkind lands to a man and his heirs, should go to the heir at common law, or be partible among all the sons; and after solemn argument by two Kentish counsel, and consideration of all the cases, the Court held, that the rent ought to descend to all the brothers according to the descent of the land; because, the rent is part of the profits of the land, and issues out of the land. (*Randall* v. *Jenkins*, 1 Mod. 96; S. C. 2 Lev. 87; 3 Keb. 165, 214; [1 Freem. 105, 346;] cited in *Edwin* v. *Thomas*, 1 Vern. 489.) The same point was ruled in *Stokes* v. *Verrier* (3 Keb. 292; S. C. 1 Mod. 112), on the authority of the foregoing case, and the same thing is affirmed by Holt, Ch. Just., in *Clements* v. *Scudamore* (Salk. 244), [and in *Brown* v. *Dyer*. (11 Mod. 98.)]

And in *Osmer* v. *Sheafe* (2 Lutw. 1205, 1210; S. C. 3 Lev. 370; Carth. 307), there is a conusance made in the name and right of a younger

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brother, for his purparty of a rent-charge granted to his ancestor in fee, out of lands in gavelkind, and judgment for the conusant. Indeed, the Reporter properly doubts, whether the conusance being for part of the rent only, was good; for it is adjudged in *Page* v. *Stedman* (Carth. 364), that coparceners cannot sever, but must join in avowry for rent. And the same rule is allowed between parceners of a seigniory in gavelkind distraining for rent-service. (7 Ed. 3, 38, 39, Avowry, 150.) *(m)*

But if the rent be issuing by one entire grant out of lands of different natures, they who claim under the custom, will have no share in the inheritance, but the common law descent will be preferred to the whole, as the most worthy.

Rent *granted* out of land at common law and borough-english, descends according to the common law. (1 And. 191, *obiter*.)

If rent is *granted* out of land of the custom of gavelkind, and out of land at common law, and the grantee dies having divers sons, the eldest only shall have the whole rent. (Note to Dyer, 5 b.) And in the case of *Randal* v.

(m) In *Decharms* v. *Horwood* (10 Bing. 526), it was held, that one coparcener cannot sue separately for his portion of rents due to him and his fellows. But he may distrain for the whole rent without the express authority of his coheirs. (*Leigh* v. *Shepherd*, 2 Brod. & Bing. 465; and see *Decharms* v. *Horwood*, suprà.) It is not however, clear, that he can do so, if they expressly dissent. (*Leigh* v. *Shepherd*, suprà; and see *Robinson* v. *Hofman*, 4 Bing. 562.)

Roberts (Noy, 15), it was adjudged in replevin, that if a man seized of land in *soke-fee* (which is to be understood land at common law, per Hale, Ch. J., 3 Keb. 215, 216), and gavelkind, grants a rent-charge out of them to B. in fee, and B. dies having issue three sons, the eldest only shall have all the rent.

But if rent is *reserved* out of land of two customary natures, as if a man make a lease for years of two acres of land, one in gavelkind, and the other in borough-english, and has issue two sons, and dies, the rent shall be apportioned, because it descends to them by course of law. (*Rushden's* case, Dyer, 5 a.) Though the true reason seems to be, that it is incident to the reversion.

And indeed, the law will be the same equally in the case of a rent *reserved* out of gavelkind lands, and lands at common law; as such rent is incident to the reversion, and apportionable on the severance of it, either by act of law, or act of the party. (Co. Litt. 148 a, 215 a.)

A man seized of two acres, the one in fee [at common law,] the other in borough-english, has issue two sons, and lets both acres for life, or years, rendering rent, with condition of re-entry; the lessor dies; by this descent, which is an act in law, the reversion, rent, and condition, are divided. (*Dumpor's* case, 4 Rep. 120 b; S. C. 1 Roll. Rep. 331; [1 Smith's Lead. cases, 16.] *(n)*

(n) In *Doe* d. *De Rutzen* v. *Lewis* (5 Ad. & Ell. 277;

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Of Tithes out of gavelkind lands.

Parsonages, tithes, &c., that came to the Crown by the statutes for the dissolution of monasteries, &c., *(a)* are made by those statutes, and that of 32 Hen. 8, c. 7, in the hands of laymen temporal inheritances, and husbands may be tenants by the curtesy, and wives endowed by them. (Co. Litt. 159 a.) Upon which may possibly arise a question of some importance, whether tithes impropriate issuing out of gavelkind lands, shall descend to the eldest son, or go according to the custom of the lands out of which they arise. And the like doubt may be made concerning dower, and tenancy by the curtesy. But it will be very difficult to maintain, that these new inheritances can be directed, or controlled by the custom, since they were within time of [legal] memory duties merely ecclesiastical, collateral to the estate of the land, and are no part of the old lay-fee. (*Priddle* v. *Napper*, 11 Rep. 13 b.) *(o)*

(a) [27 H. 8, c. 28; 31 ibid, c. 13; 37 ibid, c. 4; 1 Edw. 6, c. 14.]

S. C. 6 Nev. & Man. 771), Littledale, Just., observes, that there seems to be a very good reason for this decision, for each of the sons has an entire estate in the whole.

(o) This question is now set at rest by the decision of the Court of C. P. in *Doe* d. *Lushington* v. *The Bishop of Llandaff*. (2 Bos. and Pull. New Rep. 491; S. C. 2 Eag. & Younge's Tithe Cases, 557; cited 2 Sim. 154). It was there determined, that as a layman was incapable of having any tithes until the dissolution of the monasteries, they could not be affected by any ancient tenure, or rule of descent; and therefore, must descend entirely to the eldest son, according to the rules of descent at Common Law.

The generality of gavelkind throughout Kent.

Before I conclude this chapter, I shall take notice how generally this custom of gavelkind formerly obtained throughout the whole county of Kent; for, though it is confined to tenements of socage tenure, yet, there were fewer lands anciently holden by knight-service in this, than perhaps in any other county of the kingdom; insomuch that it is said in Pasc. 18 Ed. 2 (Mayn. 610), that *all* the land in Kent is holden in socage. But this is not to be taken literally, for it is plain by the *Milites Archiepiscopi* in Domesday, that military tenures were introduced into this county soon after the Conquest; and there are frequent instances on record in the Kentish Iters, of lands holden by knight-service; as in 39 Hen. 3, rot. 18, in dorso; 43 Hen. 3, rot. 4; 55 Hen. 3, rot. 20, 38 in dorso; 52 in dorso; 21 Ed. 1, inter plac. coron. rot. 41; and Hil. T. 10 Ed. 1, C. B. rot 27; so, in this very reign of Edward the Second, Mich. T. 9 Ed. 2, C. B. rot. 240 (post, bk. 2, ch. 3); and in Itin. Kanc. 6 Ed. 2, plac. coron., the juries of the several hundreds throughout the county, are charged to enquire *de feodis*, and accordingly find who held lands in *capite* within their several districts, as may be seen Rot. 19, &c.

However, it appears by stat. 18 Hen. 6, c. 2, that at that time, the number of military tenants in this shire was very inconsiderable, the act taking notice, that there were within the county of Kent but thirty or forty persons at most, which had any lands or tenements out of the

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tenure of gavelkind; because, the greater part of the county, or *well nigh all*, was of the tenure of gavelkind.

Indeed, the quantity of lands exempt from this custom, as to the quality of partition, was much increased by the disgavelling statutes; and this, perhaps, may have given occasion to a common mistake which I have met with among strangers to this county, that there now remains in it but little land of the nature of gavelkind.

But the presumption of law, that all the lands in this county are gavelkind, is a great friend to the custom; and if we consider the difficulty complained of even in the last age, and now grown much greater, of proving what estates, the persons comprehended in the disgavelling statutes were seized of, at the time of making those acts, together with that of shewing what lands were formerly knight-service, which is a difficulty increasing every day since the abolition of military tenures [by the stat. 12 Car. 2, c. 24,] and the expense attending the search of records for evidence of this kind, I believe I should not seem much mistaken, were I to assert, that there is now near as much land in this county subject to the control of the custom, as there was before the disgavelling statutes were made. [See the Report of the Real. Prop. Comm. post; Hasted's Hist. of Kent, vol. 1, p. 321, 2nd edit.]

V. *Wiseman* v. *Cotton*, 1 Sid. 138; [6 Man. & Gr. 282, ante, 43 n.]

CHAP. VI.

OF THE NATURE OF GAVELKIND IN POINT OF DESCENT AND PARTITION; AND OF THE REMEDIES FOR AND AGAINST PARCENERS BY THE CUSTOM.

HAVING shewn in general what lands within the county of Kent are of the nature of gavelkind, I shall now enter more particularly into the several properties of the custom, and in this I shall follow the order of the division before made, first treating of the *general*, and then of the *special* customs; and partibility being the primary and more eminent quality of gavelkind, I shall in the first place, speak of that, and its consequences, viz., the remedies given by law to or against parceners by the custom, either for the land, or by reason of the land.

Ante, p. 24.

The descent of lands in gavelkind in the right line, is so well known to be among all the sons, and in default of them, to the daughters, that it is needless to multiply authorities concerning it; especially as it is taken notice of by the statute 17 Ed. 2 *(De Prærog. Regis)*, c. 16. "In Kent in gavelkind all heirs males shall divide their in-

Descent of lands in gavelkind in the right line. Custumal of Kent, post; Litt. sect. 265.

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heritance, and likewise women; but women shall not partake with men."

Females may inherit with males by representation.

But though females claiming in their own right are postponed to males, yet it is to be understood that they may by representation, inherit together with them. For it is not to descents according to the course of the common law only, that the right of representation is confined, but it holds also in inheritances descendible according to custom, and indeed, has been taken notice of by the laws of all countries; and therefore, if a man has three sons, and purchases lands in gavelkind, and a younger son dies in the life of his father leaving issue a daughter, without doubt, the daughter shall inherit the part of her father; and yet she is not within the words of the custom *(inter hæredes masculos partibilis)*, for she is no male, but the daughter of a male, coming in his stead by representation. (Per Holt, Ch. Just., in delivering the opinion of the Court in *Clements* v. *Scudamore*, 6 Mod. 121; S. C. Salk. 243; 1 Peere W. 63; 2 Ld. Raymond, 1024, 1025; 2 Inst. 595; Lamb. Peramb. $\frac{606}{547}$; Somn. 7; *Hawtrie* v. *Auger*, Dyer, 239; [*Doe* v. *Harvey*, 4 B. & Cr. 610, per Bayley, Just.; *Denn* v. *Purvois*, 1 Burr. 326.])

And though the father purchased not the lands in gavelkind, till after the death of one of his sons, yet the representative of such son shall be admitted in his stead, as appears from the principal case of *Clements* v. *Scudamore* (suprà), which was this: A. had five sons, and the

youngest died in the life of his father leaving issue a daughter, after which, the father purchased copyhold lands of the nature of borough-english, which by the custom, were descendible to the youngest son and his heirs; and the Court upon consideration, were of opinion, that the daughter of the fifth son should inherit *jure repræsentationis*, for the custom having made the youngest son heir, the law implies all necessary incidents and consequences in point of descent. (*Clements* v. *Scudamore*, suprà.) (*p*)

Descent in the collateral line.

Nor is the partible quality of gavelkind land restrained to the right line only, but in default of lineal heirs, by the custom of Kent when one brother dies without issue, all the brothers shall inherit. (Co. Litt. 140 a; Skin. 385; Somn. 7; Spelm. Glossary, sub verbo "Gaveletum," 23 Ass. 12.) And this was taken for granted in the case of *Gouge* v. *Woodwin* (Mich. T. 8 Geo. 2), where the contest was between two brothers on the death of a third (*q*).

(*p*) On the death of a coheir intestate leaving children, the eldest son will still take the whole of his parent's share to the exclusion of the surviving coheir, notwithstanding the stat. 3 & 4 Will. 4, c. 106. (*Cooper* v. *France*, 14 Jur. 214, Ch.; *Paterson* v. *Mills*, 15 Jur. 1, Ch.; see Essay on the New Statutes by Sugden, p. 282.)

(*q*) Brothers of the half blood to each other, may succeed together as heirs in gavelkind to their common ancestor, in the same manner as daughters of the half blood take together as parceners at common law. (Chitty on Descents, p. 187.)

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And in default of brothers, their respective issue shall take *jure repræsentationis*, but then, the nephews succeeding with their uncle, the descent is *in stirpes*, and not *in capita*. (Somn. 7; 26 Hen. 8, 4 b; *Beviston* v. *Hussey*, Skin. 385, 562; [*Denn* v. *Purvois*, 1 Burr. 326; *Crump* v. *Norwood*, 7 Taunt. 362; S. C. 2 Marsh. 161.]) And so, from the nature of the thing it must be, where the sons of several brothers succeed, no uncle surviving; for though in equal degree, they stand in the place of their respective fathers *(r)*.

(r) It is remarkable, that none of the old works treating of, or referring to gavelkind, make mention of the custom extending in the collateral line beyond brothers, and their issue; nor does there appear to be any reported judicial decision on this point. From this silence in the books, an opinion has been entertained by some conveyancers (among whom may be mentioned the late Mr. Butler and Mr. Peckham), that such was the extent of the custom of partition. (See Chitty on Descents, p. 183, et seq:) But, Mr. Chitty truly observes, it is the general opinion of almost all the professional gentlemen of the County of Kent, that the collateral heirs in the remotest degree, should inherit the estates of their ancestors according to the custom, and they having therefore practised this doctrine, the titles to many estates in the County would be shaken, if it were determined otherwise; and adds, "From the cases in the Year-books (2 Ed. 3, 12; 8 Ed. 3, 42), it seems clear, that gavelkind lands are "*departible enter males*" generally; and it may be concluded, that the general partible and divisible quality of lands of gavelkind tenure, is, as it is frequently termed, 'the common law of Kent,' and this being the case, the custom must of necessity extend to collaterals." This reasoning is supported by the expressions

Ante, 7, 23.

Of gavelkind lands in tail.

Neither is our custom of gavelkind confined to inheritances in fee-simple only; for, though an estate-tail is a new kind of inheritance, introduced within time of [legal] memory by the statute *De donis*, [13 Edw. 1, st. 1, c. 1,] yet, if a man die seized of lands in gavelkind in tail, whether general or special, all the sons shall inherit together as heirs of the body (11 Ed. 3, Formedon, 30; 11 Hen. 6, 43 b; Litt. Sect. 265; 26 Hen. 8, 4 b; 1 Rep. 101 a, 103 a; Noy, 106); for it is part of the old fee-simple, though the tail be created *de novo*. (1 Mod. 196.)

And in like manner, if lands in borough-english are given to a man and the heirs of his body, the youngest son shall take. (11 Ed. 3, Formedon, 30; Litt. Sect. 603; Co. Litt. 110 b; *Weeks* v. *Carvel*, Noy, 106; [Dyer, 179 b, pl. 45; *Roe* v. *Aistrop*, 2 W. Black. 1228; *Doe* v. *Garrod*, 2 B & Ad. 87; *Trash* v. *Wood*, 4 Myl. & Cr. 324.])

Devise of gavelkind lands to three brothers, &c.

One *Fairman* seized of gavelkind lands had three sons, and devised part to one, part to another, and part to a third, and if any of them died without issue, then, the others to be his heir; this was adjudged an estate tail in each, remainder over in fee by reason of the word heir. (*Sparke* v. *Purnell*, Moor, 864.)

Whether gavelkind

In Dyer, 133, pl. 5, is put this case: A man seized of lands in gavelkind, by his last will

made use of in the statutes 17 Edw. 2, c. 16 (ante, 55), and 31 Hen. 8, c. 3. (ante, 41.)

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lands devised to a man and his wife for their lives, remainder "to the next heir male of their bodies for ever," is a devise in tail?

devises them to husband and wife for their lives, remainder *proximo hæredi masculo de corporibus suis legitimè procreato imperpetuum;* and afterwards, the husband and wife have issue three sons, and die; if the eldest son shall have the whole, or in common with his brothers, was the question:

By a manuscript note which I have seen of this case, it came in debate on a replevin brought by *Anthony May* against *John Milton* and *John Hammond;* and Portman, Ch. J., and Whiddon, Just., were of opinion, that all the sons should inherit; but Dalison, Just., held, that the eldest son should take the whole by purchase, and have a fee by reason of the word *imperpetuum.* [See Co. Litt. 9 b.]

The question turns upon this, whether the words of this devise create an estate in special tail in the husband and wife, for then all the sons may inherit; but if on the contrary, the words *next heir male* being in the singular number, are to be taken in this will, as they would in a deed, to be only words of purchase, there can be no doubt but the eldest son will take the whole. [See Co. Litt. 8 b, note (4); Preston's Treat. on Estates, vol. 2, p. 9.]

Estates *pur auter vie* of gavelkind lands.

Nor are estates of inheritance only, transmitted to all the sons according to the custom, but freeholds descendible are also of the same nature; as if a lease is made of gavelkind land to a man and his heirs *pur auter vie*, the heirs by the custom after the death of their father,

&c., shall be the special occupants; for, if lands of the nature of borough-english, be letten to a man and his heirs during the life of J. S., and the lessee dies in the life-time of J. S., the youngest son shall enjoy the lands. (Co. Litt. 110 b; *Clements* v. *Scudamore*, Salk. 243, per Holt, C. J.; *Baxter* v. *Doudswell*, 2 Lev. 138; S. C. 3 Keb. 475, 486, 498; cited in 2 Vern. 226; [2 Man. & Ry. 251, note (d).])

Of gavelkind in copyholds.

If copyhold lands descendible after the manner of gavelkind, are surrendered to the use of a man and his heirs who dies before admittance, yet the customary descent shall take place, according to the reason of the case of *Baker* v. *Dereham* (1 Mod. 102; 1 Vent. 261), where, copyhold land of the custom of borough-english, was surrendered out of Court to the use of a man and his heirs; the surrenderee died before admittance leaving two sons, and the opinion of the Court was, that the right should descend to the youngest according to the custom. (*Blunt* v. *Clarke*, 2 Sid. 61; [*Vaughan* v. *Atkins*, 5 Burr. 2786; *Rider* v. *Wood*, 1 Kay & John. 644.])

Of the manner of partition by parceners in gavelkind.

The manner of partition among parceners *ratione rei*, is much the same as among those at the common law, or *ratione personarum* (*s*); and

(*s*) The writ of partition having been abolished by the stat. 3 & 4 Will. 4, c. 27, it is now the practice, where any of the coheirs are unwilling to concur with the rest in making a partition of their estate, or are by reason of minority, or any other cause, incapable of concurring, to file

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therefore, Bracton (Lib. 2, c. 33, p. 71.) has treated of both indiscriminately in the same chapter; if there be any difference between them, it is in the manner of dividing the chief house or capital messuage; concerning which, I find nothing in the later books, but Glanville, Bracton, and Fleta, speaking of such socage lands as were partible in their times, treat of this matter almost in the same words:

"Si vero fuerit liber socmannus, tunc quidem dividetur "hæreditas inter omnes filios, &c. Salvo tamen capitali "messuagio primogenito filio pro dignitate æsneciæ suæ, ita "tamen quod in aliis rebus satisfaciat ad valentiam." (Glanv. lib. 7, c. 3.) "Et si unicum fuerit messuagium, illud in- "tegré remaneat primogenito, ita tamen quod alii habeant "ad valentiam de communi." (Bract. lib. 2, fol. 76; Fleta, lib. 5, c. 9.)

And the same authors had said a little before:

"Habet hoc privilegium primogenitus propter æsnetiam, "quod primam habebit electionem, ut si plures participes "sint ibi cohæredes, et plura capitalia messuagia, primo- "genitus primò eligat, et postea postnatus, et sic tertius, et "quartus in infinitum, quamdiu superfuerit unicum capitale "messuagium. Sed si complura ibi fuerint, non tamen tot, "quod quilibet habeat unum, tunc illis, qui expertes sunt "de communi hæreditate satisfiat ad valentiam."

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a bill in the Court of Chancery for that purpose, which Court has now also jurisdiction to decree partition of copyholds, and customary freeholds. (4 & 5 Vict. c. 35, sec. 85.) Where, however, all the coheirs are desirous to make a partition, and are personally competent to bind their interests, no judicial proceeding is requisite to carry that intention into effect; they have only to agree on the allotments to be made to the respective parties, and execute mutual conveyances. (6 Jarm. Convey. by Sweet, 587.)

And if the house chosen by the eldest, where there are many, is of greater value than those which fall to the share of the others, it seems he ought to make satisfaction to his brethren out of the rest of the inheritance, or by a rent out of the house. (Vide Litt. sec. 251; [*Clarendon* v. *Hornby*, 1 P. W. 446; *Story* v. *Johnson*, 1 You. & Coll. 538; 2 id. 611.]) (*t*)

Of suit service by parceners in gavelkind.

Even after partition of gavelkind lands, but one suit shall be done for all the parceners for such tenements, for which only one suit was before due, but all the parceners shall be contributory according to their several portions, to him that does the suit for them. (Custumal of of Kent, post; stat. 52 Hen. 3, c. 9; vide 2 Inst. 119.)

Where the entry of one parcener is the seizin of all.

The entry into and seizin of any one brother of gavelkind lands, is the entry and seizin of all the brothers coparceners with him. (43 Ed. 3, 19 a; 1 Lutw. 754.) But this must be understood of a general entry, and not where one enters claiming the whole to himself. (Co. Litt. 243 b, 373 b; 43 Ed. 3, 19 a; [*Davenport* v. *Tyrrel*, 1 W. Bl. 675.]) (*u*)

(*t*) This rent for equality of partition is a rent charge on the property (Hargr. Co. Litt. 153 a, n. (1); Litt. sec. 253), and if granted to two or more parceners for that purpose, will belong to them as coheirs, and not as joint tenants. (Co. Litt. 169 b; 2 Prest. Abs. 74.)

(*u*) The stat. 3 & 4 Will. 4, c. 27, enacts, that where one or more of several persons entitled to land or rent as coparceners, &c., have been in possession or receipt of the en-

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Of debt against heirs in gavelkind on the bond of their ancestor.

It is but reasonable, that the sons partaking alike of the advantages of the inheritance, should be equally subject to the burdens attendant on it; and therefore, if a man seized in fee of lands in gavelkind has issue three sons, and by a bond binds himself and his heirs, and dies, an action of debt is maintainable against all the sons (Co. Litt. 376 b, 386 b; Lamb. Peramb. $\frac{680}{549}$; *Game* v. *Symms*, Cro. Jac. 218); and the plaintiff in such joint action shall declare on the custom. (11 Hen. 7, 12.) * (*v*)

But then the question will be, when the obligee shall be compelled to bring his action

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tirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons, other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of, or by such last mentioned person or persons (sec. 12.) This section has been held to relate back, so as to make the possession of such persons separate from the time they first came into possession. (*Culley* v. *Taylerson*, 11 Ad. & Ell. 1008; *Doe* d. *Holt* v. *Horrocks*, 1 Car. & Kir. 566.)

* See the form of the declaration, N. Bendl. 146; Rast. Ent. 208; 1 Brownl. Decl. 111.

(*v*) The sons are only bound by the bond of their ancestor to the value of the land descended to them, and therefore, as soon as they have paid their ancestor's debt to the value of such land, they are entitled to hold the land discharged therefrom. (See *Buckley* v. *Nightingale*, 1 Strange, 665.)

against all the sons, or when he may sue the heir at common law alone; which may be resolved by the following distinctions:

If the obligor dies seized of land in gavelkind only, the writ ought of necessity to be brought against them all, for all the parceners make but one heir *(w)*.

And it has likewise been adjudged, that if the obligor leaves both lands at common law, and lands in gavelkind, the heir at common law shall not be charged alone; for, the eldest son is not chargeable simply as heir, but because he has lands by descent as heir, and this reason serves equally to charge the rest; and in such action, not only his assets at common law, but likewise his purparty in gavelkind would be liable, which that it should be severally from the rest is unreasonable. And therefore, if he be sued alone in such case, on the special matter disclosed by plea, the writ shall abate. (11 Ed. 3, Dette, 7; Hob. 25.)

But where there are assets at common law, and likewise in gavelkind, if the obligee declares generally against the sons as heirs by the custom, he shall have execution only of the lands in gavelkind; the proper way therefore to avoid all these difficulties, is, to declare in the same count against E., as heir by the common law,

(w) The non-rejoinder in the writ of any one of the coheirs may be pleaded in abatement. (Com. Dig. tit. "Abatement," F. 9.)

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and against the same E., C., and D., as heirs in gavelkind. (11 Ed. 3, Dette, 7.) In the same manner as the heir at common law, and heir in borough-english, are sued jointly in Brownl. Ent. 180. [See *Drake* v. *Robinson*, 1 P. W. 443.]

If the eldest son only has assets remaining, and the rest have aliened their parts, then the obligee may bring his action against the eldest son alone. (Lamb. Peramb. $\frac{608}{549}$; 11 Ed. 3, Dette, 7.)

But if pending a writ against the eldest son only, lands in gavelkind come to him and the others, the writ shall abate. (11 Ed. 3, Dette, 7, per Shard, Just.)

If a man having lands in gavelkind, bind himself and his heirs in a bond, and dies leaving three sons, and one of them aliens his part, and the writ be brought against them all, the whole shall be levied upon the others who have assets. As in debt against two female parceners on the bond of their ancestor, if one of them has aliened before action brought, the plaintiff shall have execution for his whole demand against the purparty of the other. (11 Ed. 3, Dette, 7.) (*x*)

(*x*) The stat. 11 Geo. 4, & 1 Will. 4, c. 47, enacts, that where an heir-at-law shall be liable to pay the debts, or perform the covenants of his ancestor in regard of any lands descended to him, and shall sell, or make over the same, before an action is brought against him, he shall be answerable for such debts or covenants in an action, to the value of the said lands, and execution may be taken out upon any judgment so obtained against him to the value of the said lands, as if the same were his own debt; but the

Hawtrie v. *Auger.*

Sir Anthony Auger being seized in fee of gavelkind lands, bound himself and his heirs in a bond, and had issue three sons, and died; the the sons entered, and the eldest of them had issue a daughter, and died; and debt was brought against the two surviving brothers and the issue of the eldest (who was but seven years old) as heirs, and the process continued until the uncles were outlawed, and the niece waived; the uncles purchased a pardon for themselves, and on a *scire facias* to the plaintiff *ad sequendum*, he declared against the uncles *simul cum* the niece; the two defendants pleaded the nonage of the niece, and prayed judgment whether they ought to answer during her nonage. But the Court held, that the parol ought not to demur, for that the infant was out of Court, and by the waivure, the original was determined against her; nor was the outlawry void, but only voidable by error. (*Hawtrie* v. *Auger*, Dyer, 239 a; S. C. N. Bendl. 146; 1 And. 10; Moor, 74; Rast. Ent. 208, 209.)

By this case it appears, that a parcener by representation shall be charged with the bond debt of the ancestor, as well as the others, though Moor, in his report, makes a *quære* of it.

Of extending the lands of the heirs in gavelkind on a judg-

Having shewn in what manner the heirs in gavelkind shall be charged by the bond of their ancestor, let us suppose the lands to descend to

lands *bonâ fide* aliened by him before the action is brought, are thereby exempted from execution. (sec. 6.)

ment of their ancestor.

V. stat. 16 & 17 Car. 2, c. 5.

all the sons charged with a judgment suffered in debt, &c., and them to make partition; in this case, if the part of one of them alone be extended for the whole debt, he may compel his coparceners to contribute, as they are all *æquali jure:*

As if a man be seized of two acres of land, one of the nature of borough-english, and binds himself in a recognizance, or judgment be given against him in debt, and he dies leaving two sons, if one is charged alone, he shall have contribution against the other. (*Harbert's* case, 3 Rep. 12 b; [see *Drake* v. *Robinson*, 1 P. W. 443.])

So, if a man be bound in a recognizance, and has two daughters and dies, and they make partition, one shall not be charged alone, but shall have contribution. (*Harbert's* case, suprà.)

To what purposes all the sons are not heirs.

We have hitherto considered all the sons as heirs, but even with respect to gavelkind lands, all the sons as to some special purposes shall not be accounted heirs; as in the case of a purchase, or to take advantage of a condition, for the heir to have the benefit of these, must not be heir to a special intent only, but the general and perfect heir, the heir at common law.

Who shall be heirs to take gavelkind lands by purchase.

If land in gavelkind is granted or devised to A. for life, remainder to the heirs, or right heirs of J. S., who has issue four sons, and dies, and afterwards the tenant for life dies, the eldest son of J. S. shall have the land; for, he takes by way of remainder, and not by descent, and he only to take by purchase is the right heir by the

common law. (37 Hen. 8, Bro. Done, 42; Nosme, 6, Discent, 59; 1 Rep. 101, 103 a; Lamb. Peramb. $\frac{607}{548}$; Hob. 31; Co. Litt. 10 a, [and note (4) by Hargrave; *Thorp* v. *Owen*, 2 Smale & Gif. 90.]) And the same is law of borough-english. (Hob. 31; [see infrà, 70, note (*z*).]) (*y*)

But, if a man having gavelkind land, devises other lands to his heirs in gavelkind, all his sons shall take as sufficiently described by this devise, though not heirs by the common law. (Per Cowper, Lord Chanc. in *Newcomen* v. *Barkham*, 2 Vern. 732; S. C. Prec. in Chan. 464.)

And if a man seized in fee of lands in gavelkind, makes a gift in tail, or lease for life to J. S., remainder to his own right heirs, then it seems, all his sons shall take by the name of right heirs; for, the remainder limited to the right heirs of the donor, is only a reversion, he bearing in himself during his life (in judgment of law) all his heirs, and therefore, the heir shall have it by descent. (Co. Litt. 22 b; Dav. 31 a.)

So, if a man seized of lands in gavelkind, make a feoffment to the use of himself and his wife in tail, remainder to his own right heirs, this remainder shall go to the heirs by the cus-

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(*y*) The reason is, because this remainder, being newly created, could not be reckoned to be within the old custom. (Bacon's Abr. tit. "Gavelkind.") The Court of Chancery will also direct the conveyance of executory trusts, to be made according to the rules of the common law. See ante, p. 47, n. (k).

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tom (26 H. 8, 4 b, Bro. Custom, 1; Lamb. Peramb. 548); for it is the old use, and the heirs take by descent, their ancestor having a precedent estate of freehold, and not by purchase. [See *Doe* v. *Jones*, 2 Dowl. & Ry. 373, per Holroyd, Just.] *(z)*

Who is heir to take advantage of a condition annexed to gavelkind lands.

If a man aliens lands in gavelkind on condition, and dies, the eldest son only shall enter for the condition broken, and the right of entry does not descend to all the sons. (Lamb. Peramb. $\frac{608}{549}$; Noy's Max. 82; Dyer, 343 b.) And the same law is of a condition annexed to borough-english lands (3 Rep. 21; Moor, 114; Dyer, 343 b); for, the heir to take advantage of a

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(z) If land be now limited by any assurance to the person, or to the heirs of the person, who thereby conveyed the same land, such person will acquire the same as a *purchaser* by virtue of such assurance, and will not be entitled thereto as his former estate, or part thereof. (3 & 4 Will. 4, c. 106, sec. 3.) Consequently, the heir at common law would now take the land by purchase. (Hargr. Co. Litt. 24 b, note (3); see ante, p. 68.) Even formerly, if the heir could not take the estate in the same way as he would have done by descent, the gift to him operated, for, in *Bear's* Case (1 Leon. 112; S. C. Gouldsb. 88), it was held, that a devise of gavelkind lands to the testator's sons and their heirs, equally to be divided among them, gave them an estate by purchase, and would have done so without words of division. (See also *Rigden* v. *Vallier*, 3 Atk. 711.) And now by the 3rd section of the above statute, if land be devised to the heir, or to the person who shall be the heir of the testator, such heir will acquire the land as a devisee, and not by descent.

condition, must be the heir at common law, the complete heir. (9 Hen. 7, 25.) *(a)*

It seems indeed, that when the eldest son has entered into the whole for breach of the condition, and defeated the estate of the grantee, the younger sons may enter into their part, and hold together with their brother [Bac. Abr. tit. "Gavelkind"]; in like manner, as if a man seized of land on the part of the mother, makes a feoffment in fee on condition, and dies [without issue,] the heir on the part of the father, who is heir at common law, shall enter for the condition broken, but the heir on the part of the mother, shall enter upon him and enjoy the land. (Co. Litt. 12 b; *Wimbish* v. *Tailbois*, Plow. 57 a.)

But we ought to distinguish between a condition in gross, and a condition incident to a reversion; for, of the latter, the special heir shall take advantage, though not of the former: A man made a lease of land, parcel borough-english, and parcel at common law, by indenture, for twenty-one years; provided, that if the lessor, his heirs, or assigns, should give a year's warning to the lessee, that he, his heirs, or assigns, would dwell there, then the lease to be avoided; the lessor died leaving two sons, the eldest assigned over his part to the youngest; and the question was, whether the youngest son was such a person

(a) The reason is, because the condition is a thing of new creation, and altogether collateral to the land, being not in any manner like the rent, which is part of the profits of the land itself. (Bacon's Abr. tit. "Gavelkind.")

as could give warning, or, whether the condition was not gone by the severance of the reversion on the death of the father. Manwood, and Monson, Justices, were of opinion, that he might give warning, and that the law, which severed the reversion, had severed the condition also. And so for one part, as heir in borough-english, and for the other, as assignee of his elder brother (by the Stat. 32 Hen. 8, c. 34), (*b*) he shall take advantage of the condition. But if a man makes a feoffment in fee of borough-english lands on condition, and dies, having issue two sons, the eldest only shall take advantage of the condition, for it is a condition in gross; but in this case there was a reversion in the lessor. (Moor, 113; S. C. Godb. 2.)

And it is likewise laid down in Co. Litt. 215 a,* that if a lease for years be made of two acres,

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(*b*) This Act enacts, that assignees of reversions shall have the same advantages against the lessees, by entry for nonpayment of rent, or, for committing waste, or other forfeiture, and the same remedies by action only, for not performing other conditions, covenants, or agreements, contained in the leases, as the lessors previously had. (sec. 1.)

* It is difficult to reconcile with this, another passage in the same book: That if a man seized of lands *ex parte matris*, makes a gift in tail or lease for life, the heir of the part of the mother shall have the reversion; and the rent also, as incident thereunto, shall pass with it; *but the heir of the part of the mother, shall not take advantage of a condition annexed to the same; because, it is not incident to the reversion, nor can pass therewith.* (Co. Litt. 12 b.) But, as this is not warranted by the case cited as an au-

one of the nature of borough-english, the other at common law, on condition, and the lessor dies leaving issue two sons, each of them shall enter for the condition broken, for, by act of law, a condition may be apportioned. And the same thing is agreed in *Dumpor's* case (4 Rep. 120 b); and in 1 Rolle's Rep. 331. (Ante, 51.)

When words of condition in a will of gavelkind lands shall be construed a limitation.

Manwood, Just., in Dyer, 316 b, puts this case: A man seized in fee of land in gavelkind, has issue two sons, and by his will devises the land to his eldest son, on condition that he pay to the wife of the devisor £100 at a certain day, and he fails of payment, whether the younger son may enter on a moiety upon his brother, by a limitation implied in the estate? *Quære:*

But this doubt is, as Lord Coke observes, well resolved by the following determination:

Wellock v. *Hammond.*

A copyholder in fee of land descendible in borough-english, having three sons and a daughter, after a surrender to the use of his will, devises the land to his *eldest* son, paying to his daughter and each of his other sons 40s. within two years after his death; the eldest son is admitted, and

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thority for it, in the margin of that book, I have adhered to the other opinions as more agreeable to common reason (*b*).

(*b*) Mr. Preston (2 Abs. 428), thinks the reason on which Robinson objects to the doctrine in Co. Litt. 12 b, is not quite satisfactory; and says, "In the case Robinson quotes from Co. Litt. 215 a, the customary heir takes advantage of the condition in right of a reversion in him, since it is a condition annexed to an estate for years, and not a condition annexed to a grant of the fee."

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does not pay the money; the youngest son enters on the land, and his entry was held lawful; for, though the word *paying* in case of a will may make a condition, yet, here the law construes it a limitation, of which the youngest son in borough-english may take advantage; and it is the same, as if he had devised the land to his eldest son, until he made default in payment; for, if it should have been a condition, then it would have descended to the eldest son, and it would consequently have been at his pleasure, whether his brothers or sister should be paid or not. (*Wellock* v. *Hammond*, 3 Rep. 20 b, 21 a; Cro. Eliz. 204; 2 Leon. 114.)

But let us put a case a little different from the former: A man having three sons, devises gavelkind lands to his *second* son, paying, or upon condition to pay, to each of his other sons £100, and the devisee fails of payment; I take it, that the youngest son cannot take advantage of this, by entering into a third part; but in order to defeat the devise, the eldest son ought first to enter upon the whole, agreeably to the determination in the case of *Curteis* v. *Wolverston* (Cro. Jac. 56), where, a man having three sons, and several daughters, devised lands descendible in borough-english to his *second* son in fee, on condition to pay 20*l.* to each of his daughters at their age of twenty-one; the devisee not paying the money at the time, the youngest son entered in his own name; but it was held ill, for this shall not be taken as a limitation,

but as a condition, it differing from the reason of the case of *Wellock* v. *Hammond*, where, had it been construed a condition, it had been void and to no purpose; but it shall be expounded according to the common law, where it is not necessary to give it a contrary exposition.

Case where Equity refused relief.

Culpeper's case.

[In *Culpeper's* case (cited in *Sanders* v. *Deligne*, 2 Freem. 124), a man bought gavelkind land of the eldest son, and paid his purchase money without knowledge that it was gavelkind, and afterwards for a mere nominal consideration, bought in the titles of the younger brothers, who were ignorant of their titles; yet the Court of Chancery refused them relief, because, the purchaser having honestly paid his money without notice, might use what means he could to fortify his title. But it is said this case would not be followed. (2 Sugd. Vend. & Purch. 1020, 11th edit.)

Whether the doctrine of *Cy-près* can be applied to gavelkind lands.

Monypenny v. *Dering*.

[It appears to be doubtful whether the doctrine of approximation, or *cy-près* as it is called, can be applied by the Court of Chancery to lands of gavelkind tenure. In *Monypenny* v. *Dering* (7 Hare 568), Wigram, V. C. observed, "Another objection urged against the application "of the *cy-près* doctrine, was founded upon the "tenure of the land. It was said, that however "right it might be to apply the doctrine to "socage lands, it had never been applied to "*gavelkind lands*; that the doctrine was as in-"applicable to lands of such tenure, as it was "to personal estate, and that the primary inten-

"tion of the Testator, would no more be secured "in the one case than in the other, by the appli- "cation of the *cy-près* doctine. I may perhaps, "doubt, whether if the lands to which the doc- "trine was first to be applied, had been of *gavel-* "*kind* tenure, the doctrine would have been ap- "plied. It might indeed, happen, that there "never should be more than one male descend- "ant in the family; and in that case, the prac- "tical working of the doctrine in lands of gavel- "kind tenure would be the same, as if the lands "were of socage tenure. But such an accident "*ex post facto*, would not support the proposition "upon which the *cy-près* doctrine is founded, viz. "that the Court, by giving an estate tail to the "first tenant for life, had thereby placed the "property in a position in which (if nothing be "done to disturb it), the law itself would carry "the property to those for whom the Testator "intended it."]

BOOK II.

OF THE SPECIAL CUSTOMS INCIDENT TO GAVELKIND LANDS IN KENT.

CHAP. I.

OF TENANCY BY THE CURTESY.

I NOW come to treat of the *special* or *particular* customs, which the courts of law will not take notice of barely on alleging the lands to be of the nature, or tenure of gavelkind, but which ought to be pleaded as specially as other customs; such as, according to the opinion of the Court in the case of *Wiseman* v. *Cotton* (ante, p. 25), are not properly incident to, or inseparable from the nature of gavelkind, and yet are by immemorial usage, annexed to land of this tenure in the county of Kent, equally with partition; and indeed, at this day, are more extensive than that, these still continuing to take place (as has been before observed) even in lands disgavelled.

Ante, 24,25.

Ante, p. 42.

I shall first begin with the tenancy by the curtesy of the wife's inheritance in gavelkind.

Book II.

How this custom differs from the curtesy of England.

This was formerly called the man's * *freebench*, and differs from the husband's estate by the curtesy of England, both in quantity, it being but of a moiety, and in quality, as it is obtained on more easy terms, for, children are not necessary to entitle to it; and indeed, enjoyed upon different conditions, it being liable to be forfeited by the marriage of the tenant.

But as I have heard some doubt made, whether there be any usage in this County variant from the common law concerning tenancy by the curtesy, I shall not content myself with this short account of the peculiarities of this custom, but think it necessary to cite in a more particular manner, what authorities I have found on record, or in the books in support thereof, that no room may be left for future disputes concerning it.

Authorities to shew that the husband is entitled after issue had, only to a moiety as long as unmarried.

I shall therefore endeavour to shew, 1st, That the husband surviving the wife, is, even *after issue had* between them, by the custom of Kent entitled to no more than a moiety of her gavelkind lands, and that only while he lives unmarried.

2ndly, That the custom gives him the same advantage, though he never had issue by his wife.

The first is generally accounted the more doubtful point; but I choose to begin with it, because it will appear to be put most beyond

* Post, Itin. Kanc. 39 Hen. 3, rot. 14, in dorso ; rot. 26, in dorso ; 9 Ed. 3, 38 a ; Somn. 179.

controversy, by the evidence on record as to this matter, which is very strong, and in order of time as follows:

John le Mose v. *Peltebeam.*

Itin. Kanc. 39 Hen. 3, rot. 14, in dorso. A *cui in vitâ* by *John le Mose* and *Juliana* his wife against *John Peltebeam*, for a messuage and lands in *Malling*.

"Et *Johannes Peltebeam* venit, et de medietate prædic-
"torum tenementorum dicit, quod ipse non potest respondere,
"quia dicit, quod non tenet prædictam terram nisi in cus-
"todiâ cum quodam *Philippo* filio suo, cujus jus et hære-
"ditas prædicta terra est, et qui est infra ætatem et in cus-
"todiâ suâ; et de alterâ medietate dicit, quod *tenet medieta-*
"*tem illam tanquam liberum bancum suum, per legem et*
"*consuetudinem Kanciæ*, eò quod prædictum tenementum
"fuit jus et hæreditas cujusdam *Rosamundæ*, quondam
"uxoris suæ; et vocat inde ad warrantum prædictum *Phi-*
"*lippum* filium et hæredem prædictæ *Rosamundæ*, qui est
"infra ætatem. Ideo loquela ista, quantum ad medietatem
"prædictam, quam ipse tenet in liberum bancum suum sine
"die, usq. ad ætatem prædicti *Philippi;* et de aliâ medie-
"tate prædicta, consideratum est quod prædictus *Johannes*
"*Peltebeam* inde sine die, et *Johannes* et *Juliana* in mi'a
"pro falso clamore."

Tenant pleads, that he is seized but of a moiety, and of that as his free-bench by the custom of Kent, being the inheritance of his late wife.

And prays in aid of his son, his wife's heir, &c.

Wm. de Hersing v. *S. de Haliberg.*

Itin. Kanc. 55 Hen. 3, rot. 7. "Assisa venit recognitura
"si *Simeon de Haliberg* et *Beatrix* uxor ejus, &c. injuste
"dissesisiverunt *Will'um* filium *Johannis de Hersing* de li-
"bero tenemento, &c. Et *Simeon* et *Beatrix* uxor ejus
"dicunt, quod prædictus *Will'us* injuste tulit assisam illam
"contra eos, quia dicunt quod prædictum tenementum, quod
"prædictus *Will'us* posuit in visu suo, fuit jus et hæreditas
"cujusdam *Christianæ*, quondam uxoris suæ, et sororis præ-
"dictæ *Beatricis*, cujus hæres ipsa est; ita quod idem
"*Will'us*, vivente prædictâ *Christianâ* uxore suâ, tenuit
"prædictum tenementum in manu suâ, et postea mortuâ
"eâdem *Christianâ*, tenuit idem *Will'us* prædictum tene-
"mentum* *per legem* Angliæ, *sicut ei licuit, quamdiu se*

Tenants plead, that the plaintiff was entitled but as tenant by the curtesy, and that he forfeited his estate by marrying again, being gavelkind, &c.

* The reader may observe, that several of these records take no

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"*tenuit sine uxore sibi desponsata;* et quia idem *Will'us* "postea desponsavit quandam uxorem, idem *Simeon* et "*Beatrix*, eò quòd proles suscepta de prædictis *Will'o* et "*Christianâ* obiit, posuerunt se in prædicto tenemento no- "mine ipsius *Beatricis* propinquioris hæredis prædictæ "*Christianæ*, sicut eis licuit *secundum legem et consuetu-* "*dinem tenementorum in gavylkinde*."

Plaintiff replies, that the lands are not of such nature.

"Et prædictus *Will'us* bene concedit, quod ipse nihil cla- "mat nisi nomine prædictæ *Christianæ*, sed dicit quod præ- "dictum tenementum non est talis naturæ, quod illi, qui "illud tenent per legem *Angliæ*, illud amittere debeant, "licet ad secundas nuptias convolaverunt; et de hoc se

Nonsuit.

"ponit super assisam. Postea prædictus *Will'us* non est "prosecutus breve suum, &c."

John le Gule v. *Mabiliale Gule.*

In eodem itin. rot. 51. "Assisa venit recognitura si "*Mabilia* filia *Dyonisiæ*, et alii, injuste disseisiverunt *Jo-* "*hannem le Gule* de libero tenemento suo, &c."

Tenant pleads, that the plaintiff being seized as tenant by the curtesy, married again and committed waste, and

"Et *Mabilia* et alii venerunt, et *Mabilia* respondet pro "se et omnibus aliis, et dicit, quod prædictum messuagium "et terræ fuerunt perquisitum prædictæ *Dyonisiæ* matris "suæ, quæ nupta fuit prædicto *Johanni le Gule*, ita quod, "post mortem ejusdem *Dyonisiæ*, prædictus *Johannes* tenuit "prædicta tenementa per *legem gavelykynd*, et quia fecit

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notice that the quantity of the husband's estate by the custom, is different from that by the curtesy of England; but it will occur at the same time, that the question in them, was not what part the tenant was entitled to at the death of his wife, but only, whether he had by a subsequent act forfeited that estate, whatever it was; and the conclusion of them all is, that the tenant had lost his estate, so that it became entirely immaterial what he had before. The reasons of the husband's not demanding a *moiety* only of so many acres, &c., are, 1st, Because he might remain in the whole *quousq: partitum fuit, &c.* as appears by the record of Itin. Kanc. 21 Ed. 1, rot. 1 (post, 82), where, on this account, though his claim is but of a moiety, he has judgment for the whole. 2ndly, If the action was brought after partition made, then he no longer remained tenant of an undivided moiety, but of course counted for the whole of so many acres, as were allotted to him on the partition, as we see in Itin. Kanc. 6 Ed. 2, rot. 17 (post, 84). The rest of the records put it out of all doubt that he is but entitled to a moiety.

"vastum et estrapamentum de eodem tenemento, *postquam* "*aliam uxorem duxerat*, prædicta *Mabilia* intravit in præ- "dicta tenementa per capitalem dominum ejusdem feodi, ut "in hæreditatem suam, prout ei bene licuit, secundum legem "et consuetudinem gavelykindorum."

that she entered, &c. by the custom of gavelkind.

"Et prædictus *Johannes* dicit, quod nihil habuit in præ- "dictis tenementis nomine prædictæ *Dyonisiæ*, quia dicit "quod tenementa fuerunt perquisitum suum, &c."

Plaintiff replies, that the lands are of his own purchase.

"Juratores dicunt, super sacramentum suum, quod præ- "dictum tenementum fuit jus prædictæ *Dyonisiæ*, uxoris "prædicti *Johannis*, qui *tenementum illud postea tenuit per* "*legem* Angliæ, *et quia idem* Johannes *secundò maritavit, et* "*fecit vastum et venditionem* de prædictis tenementis, præ- "dicta *Mabilia intravit in* prædicta tenementa, *secundum* "*quod ei licuit per legem* Kanciæ. Ideo consideratum est, "quod prædicta *Mabilia* et alii eant inde sine die, et præ- "dictus *Johannes* nihil capiat per assisam, sed sit in mi'a, &c."

Verdict and judgment for the tenant.

Itin. Kanc. 7 Ed. 1, rot. 3, in dorso, Rex Roll. In an assize brought by *William* and *Thomas*, sons of *Hugh de Hormesdesholl*, against *Stephen Arnet*, for a messuage and two acres of meadow in *Westbere*, the tenant pleads, that the premises in question "fuerunt jus et hæreditas *Julianæ*, "quondam uxoris suæ, &c., quæ inde obiit seisita, de quâ "ipse suscitavit prolem, unde dicit, quòd nihil clamat in "prædictis tenementis, nisi per legem *Angliæ*, ratione præ- "dictæ prolis ex eâ suscitatæ, &c."

Wm. de Hormesdesholl v. *Arnet*.

Tenant pleads, that he is in by the curtesy of England.

"Et iidem *Will'us* et *Thomas* dicunt, quod prædictus "*Stephanus* nihil clamare potest in tenementis prædictis "per legem *Angliæ*, quia, dicunt quòd prædictum tenemen- "tum tenetur in gavelckynde, et *consuetudo de gavelekynde* "*talis est, quòd cum aliquis desponsavit mulierem habentem* "*hæreditatem, et ex eâ suscitavit prolem, et post mortem* "*illius mulieris, aliam duxerit in uxorem, hæredes primæ* "*mulieris habent actionem petendi hæreditatem primæ uxoris;* "et dicunt, quod prædictus *Stephanus* post mortem præ- "dictæ *Julianæ*, primæ uxoris suæ, matris prædictorum "*Will'i* et *Thomæ*, duxit quandam uxorem quæ adhuc su- "perstes est. Postea venit jurata, *et dicit quòd talis est* "*consuetudo patriæ*, qualis prædicti *Will'us* et *Thomas* dicunt,

Plaintiffs reply the custom of gavelkind, to forfeit by second marriage, &c.

Verdict finds the custom, &c.

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"et quòd prædictus *Stephanus* quandam aliam in uxorem "duxit, quæ adhuc superstes est. Ideo consideratum est, Judgment for the plaintiffs. "quòd prædictus *Will'us* et *Thomas* recuperent seisinam "suam, &c."

Stoc v. *R. de Thirling.*

Itin. Kanc. 21 Ed. 1, Berewicke Roll, rot. 1, in dorso. In an assize brought by *William Stoc* against *Robert*, son of *Robert de Thirling*, for lands in *Sturry* and *Westbere*, the tenant pleads in bar, that he is son and heir of *Maud* of *Westbere*, who died seized of the premises in question. Plaintiff entitles himself to a moiety as tenant by the curtesy, according to the custom of gavelkind. The plaintiff in his replication, admits that *Maud* died seized, "sed dicit quòd ipse desponsavit prædictam *Matil-* "*dam*, de quâ suscitavit prolem, ratione cujus prolis, ipse "habere debet *medietatem* totius tenementi de quo ipsa "*Matilda* obiit seisita, per consuetudinem *Kanciæ*, eò quod "tenementa prædicta tenentur in gavelykende, et in eodem "morari debet, quousq. partitum fuerit inter ipsum et "hæredem."

The tenant rejoins, and confesses that the plaintiff had issue by *Maud*, "sed dicit quòd *Will'us* eâ ratione de tene- "mentis quæ tenentur in gavylekende secundum consuetu- "dinem *Kanciæ* nihil habere debet; et hoc paratus est "verificare."

The whole county find the custom. "Et quia *TOTUS COMITATUS* * *recordatur, quòd*

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* Issues joined on any custom of the County of Kent, were, even before the stat. 4 Anne, c. 16, tried by a jury of the body of the County, as appears by a record between *Beddyl* and *Crouther* (Mich. T. 11 Hen. 8, B. R. rot. 88), where, the issue being on the custom of Kent, it is entered on the roll, that the Court of King's Bench before they awarded the *venire* to the Sheriff to return the jury, consulted with the Judges of the Common Pleas about the manner of it, and then, because the said issue touched and concerned the commonalty of the County of Kent, awarded the *venire de corpore comitatûs.* And in this, the Court seem to have imitated the ancient practice of the Justices in Eyre, who, on questions concerning the customs of this County, often consulted as the records testify (suprà, and post, chap. 3), *totum comitatum;* by which expression may possibly be meant, all those that were bound by the general summons to give their attendance on that Court, and who they were appears by the writ in Bracton, lib. 3, c. 11, page 109 b. "Rex vic. salutem. Summoneas per bonos summonitores, omnes Archiepiscopos, Episcopos, Abbates, Priores, Comites,

"*quilibet vir qui desponsaverit mulierem, quæ tenementa* "*habet de hæreditate suâ, et de ipsâ prolem suscitaverit,* "*post mortem ejusdem uxoris, habere debet medietatem totius* "*hæreditatis ejusdem tenendam ad terminum vitæ suæ, nisi* "*prius aliam duxerit uxorem.* Ideò consideratum est, quòd "prædictus *Will'us* recuperet seisinam suam de prædictis "tenementis."

Salomon de Atteseld's case.

In eod. itin. rot. 41. An assize brought against *Salomon*, son of *Hugh de Atteseld*, who pleads non-tenure in the following special manner: "Venit et dicit, quòd prædictum "tenementum fuit de gavelecund, et quòd quædam *Christiana*, "quondam uxor sua, obiit inde seisita ut de feodo, post "cujus mortem, prædictus *Salomon* tenuit tenementa præ- "dicta per legem *Angliæ*, quousque secundam uxorem des- "ponsaverat, per quod incontinenti per consuetudinem de "gavelecund forisfecit ipse tenementa prædicta; et liberum "tenementum eorundem tenementorum fuit quarundam *Jo-* "*hannæ* et *Margeriæ*, filiarum ipsorum *Salomon* et prædictæ "*Christianæ*, et quòd *Christianæ* prædictæ *Johanna* et *Mar-* "*geria* hæredes sunt; inde dicit quòd ipse non tenet." And issue is taken on the non-tenure.

Tenant pleads non-tenure, for, that he had been tenant by the curtesy, but had forfeited by the custom of gavelkind, by marrying again.

The jury find accordingly.

"Juratores dicunt super sacramentum suum, quòd præ- "dicta *Christiana* obiit seisita de tenementis prædictis ut de "feodo, post cujus mortem, *prædictus Salomon tenuit* tene- "menta prædicta per legem *Angliæ*, *quousque secundam* "*uxorem suam desponsaverat*, per quod incontinenti postea "liberum tenementum prædictum tenementum fuit prædictæ "*Johannæ* et *Margeriæ*, ut hæredum prædictæ *Christianæ*, "sicut prædicitur, unde dicunt quòd prædictus *Salomon* die "et anno, &c. non tenuit, &c."

In assize, the jury find that the tenant by

In eodem itin. rot. 70. In an assize brought for lands, part at common law, and part gavelkind, "juratores super

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Barones, Milites, et liberè Tenentes de tota balliva tua, et *de quâlibet villâ quatuor legales homines et præpositum*, et de quolibet burgo duodecim legales burgenses per totam ballivam tuam, et omnes illos, qui coram justiciariis itinerantibus venire solent et debent, quod sint apud talem locum tali die, &c. coram dilectis, &c. quos justiciarios nostros constituimus, audituri, et facturi præceptum nostrum."

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the curtesy of gavelkind, shall have but a moiety by the custom.

"sacramentum dicunt, quòd prædicta tenementa fuerunt jus "prædictæ *Aliciæ*, matris prædicti *Johannis*, et quondam "uxoris prædicti *Will'i*, de quâ idem *Will'us* prolem susci- "tavit, ratione cujus prolis, idem *Will'us* remansit in eisdem "tenementis post mortem prædictæ *Aliciæ*, ut in illis quæ "tenere debuit per legem *Angliæ*, quousq : prædicti *Johan-* "*nes*, &c. ipsum injustè disseisiverunt ; dicunt etiam, quòd "*quædam pars prædictorum tenementorum tenetur in gavelc-* "*kende, unde prædictus* Will'us *tantum habere debet medie-* "*tatem, secundum consuetudinem comitatûs istius.*

P. de Merdale v. *Wm. de Merdale.*

"Itin. Kanc. 6 Ed. 2, rot. 17. Assisa venit recognitura "si *Will'us*, filius *Petri de Merdale*, et alii, injustè, &c. dis- "seisiverunt *Petrum de Merdale* de libero tenemento suo in "*Rainham* et *Hartlip*, &c. Unde queritur quod disseisiverunt "eum de uno messuagio, decem aeris terræ, et octo solidatis "redditûs cum pertinentiis, &c.

Tenant pleads, that the plaintiff was never seized, &c.

"Et prædictus *Will'us* filius *Petri* respondet ut tenens, "&c. et dicit quòd prædictus *Petrus* injustè tulit assisam "istam versus eum, &c. quia dicit, quòd idem *Petrus* nun- "quam fuit in seisinâ de prædictis tenementis cum perti- "nentiis, ut de libero tenemento suo, ita quòd potuit dis- "seisiri, et de hoc se ponit super patriam, et prædictus "*Petrus* similiter, ideo capiatur assisa.

The jury find that the plaintiff was seized as of a moiety of the inheritance of his late wife, by the custom of gavelkind, to hold while sole.

"Juratores dicunt super sacramentum suum, quòd præ- "dicta tenementa, quæ prædictus *Petrus* posuit in visu suo, "et unde queritur se disseisiri, tenentur in gavelykynde, et "sunt medietas unius messuagii, viginti acrarum terræ, et "sexdecim solidatorum redditûs cum pertinentiis, quæ ali- "quo tempore fuerunt in seisinâ prædicti *Petri* et cujusdam "*Agnetis*, quondam uxoris ipsius *Petri*, ut de jure et hære- "ditate ipsius *Agnetis*. Qui quidam *Petrus* procreavit de "ipsâ *Agnete* duos filios, scil. prædictum *Will'um* filium "*Petri*, et quondam *Rogerum*, *post mortem cujus* Agnetis, "*medietas eorundem tenementorum, secundum consuetudinem* "*de gavelykynde, remansit et remanere debuit prædicto* "Petro, *tenenda eidem* Petro *ad terminum vitæ ipsius* Petri, "*scil. quamdiu sine aliâ uxore ducendâ se teneret ;* et alia "medietas eorundem tenementorum, inter prædictum *Will'um*, "filium *Petri*, et *Rogerum*, fratrem ejus, æqualiter partita

"fuit; et dicunt quòd postea, prædicto *Will'o* filio *Petri* "ætatis quindecim annorum existente, *quando idem* Will'us "*fuit plenæ ætatis, secundum consuetudinem de gavelykynde,* "*scil. post quintum decimum annum completum,* per quod- "dam scriptum confectum apud *London.* concessit et dimisit "prædicto *Petro* omnes terras et tenementa cum pertinentiis, "quæ habuit, sive habere potuit in villis prædictis, per suc- "cessionem hæreditariam de prædicta *Agnete* matre ipsius "*Will'i,* tenendum eidem *Petro* ad terminum vitæ ipsius "*Petri;* prædictis tenementis, unde assisa ista arrainata est, "in seisinâ prædicti *Petri* existentibus; qui quidem *Will'us,* "postea rediens ad prædicta tenementa, factum suum præ- "dictum patriæ notificavit et ratum habuit. Et dicunt, "quòd prædictus *Petrus* postmodùm se maritavit et cepit "uxorem, et quòd prædictus *Rogerus* frater postnatus, quam- "cito constabat ei quòd prædictus *Petrus* maritavit se ut "prædictum est, *vendicavit residuum prædictæ medietatis,* "*quam prædictus* Petrus *tenuit secundùm consuetudinem* "*prædictam, quæ ei accrevit ratione quòd idem* Petrus *cepit* "*uxorem,* et quod idem *Petrus* medietatem dictæ medietatis, "quam idem *Petrus* tenuit per prædictam consuetudinem de "gavelykynde de proparte ipsius *Rogeri,* liberavit eidem "*Rogero.* Et quòd prædictus *Will'us* querens, sciens quòd "prædictus *Petrus* pater suus ceperat uxorem sicut præ- "dictum est, nullum clameum apposuit versus ipsum *Petrum* "pro parte suâ de hæreditate habendâ, sed morabatur cum "ipso *Petro* per unum annum et dimidium, postquam idem "*Petrus* cepit prædictam uxorem suam secundam, absq. "aliquo impedimento prædicto *Petro* inde faciendo; et sic "idem *Petrus* remansit in seisinâ de prædictis tenementis, "per totum tempus prædictum pacificè, quousq. prædictus "*Will'us* filius *Petri* ipsum *Petrum* inde ejecit. Ideo consi- "deratum est, quòd prædictus *Petrus* recuperet seisinam "suam de medietate prædictorum tenementorum, unde que- "ritur se disseisiri, scil. de illâ medietate, quæ cecidit in "propartem prædicti *Will'i* filii *Petri,* quando participatio "prædicta facta fuit inter ipsum *Will'um* et *Rogerum* fra- "trem ejus ut prædictum est, per visum recognitorum, et "damna sua, quæ taxantur per eosdem ad unam marcam;

And being seized, the tenant at the age of 15 released, &c.

And that the plaintiff afterwards married a second wife, and upon the claim of *Roger* one of the sons, delivered to him his purparty of the said moiety as forfeited.

But *Wm.* made no claim for above a year and a half, &c.

Judgment for the plaintiff, because the the tenant had released, &c.

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"et *Will'us* filius *Petri* in mîa, &c. Et quoad aliam medie-
"tatem eorundem tenementorum, quæ remansit prædicto
"*Petro* post mortem prædictæ *Agnetis*, tenenda eidem *Petro*
"secundum consuetudinem de gavelykynde, in formâ præ-
"dictâ ut prædictum est, dies datus est eis de audiendo
"judicio suo hîc die Martis, &c. Postea ad illum diem venit
"prædictus *Petrus*, et alii non venerunt; et quia per assisam
"prædictam compertum est, quòd prædictus *Will'us* * secun-
"dùm consuetudinem de gavelykynde, tempore quo concessit
"et dimisit prædicto *Petro* prædictam medietatem, quæ ei
"remansit, &c., et factum suum cum patriâ istâ ratum
"habuit, moram faciens cum prædicto *Petro* ut prædictum
"est; et quòd idem *Petrus* seisinam suam inde continuavit,
"quousq. prædictus *Will'us* postea per longum tempus ip-
"sum *Petrum* inde contra factum suum ejecit, consideratum
"est quòd prædictus *Petrus* recuperet inde seisinam suam
"per visum recognitorum, et damna sua, quæ taxantur per
"eosdem ad unam marcam; et *Will'us* in mîa; et similiter
"prædictus *Petrus* in mîa pro falso clamore versus alios in
"brevi, &c."

There is a report of this last case among others of the same *Eyre*, given to *Lincoln's Inn* Library by Hale, Ch. Just.

And it appears further by *John Scerre's* case, to be found inter plac. ass. in com. Kanc. 3 Edw. 2; *Alexander de Greenhethe's* case, Ass. in eod. com. 15 Edw. 2; *Robert le Pykoc's* case, Ass. in eod. com. 17 Edw. 2, and 19 Edw. 2; and *William de Adehullegate's* case, Ass. in eod. com. 19 Edw. 2; that tenant by the curtesy of gavelkind lands is entitled but to a moiety.

Back v. *Claver.*

Mich. T. 13 Rich. 2, C. B. rot. 645, Kanc. In an action of trespass brought by *Richard Back* and *William Holy*

* The words *fuit plenæ ætatis*, seem to be left out of the record, for they are necessary to complete the sense.

against *Thomas Claver*, for breaking their close at *Bapchild* and *Tong*, &c., and cutting down the corn, &c., the Defendant pleads, "Quod quædam *Godelina Claver*, quæ "fuit uxor ipsius *Thomæ Claver*, fuit seisita de uno mes- "suagio et septem acris terræ cum pertinentiis in præ- "dicta villâ de *Bapchild*, in dominico suo ut de feodo, quæ "tenementa sunt de tenura de gavelkynde in comitatu *Kan-* "*ciæ*, et inde obiit seisita, et secundum consuetudinem de "tenurâ de gavelkynd de tenementis, unde mulieres sic sei- "sitæ sunt, viri post mortem earundem mulierum, debent "tenere medietatem tenementorum illorum pro indiviso "[* simul cum hæredibus] earundem mulierum, dum tamen "viri prædicti se tenent non maritatos; et dicit quòd præ- "dicta *Godelina* obiit seisita de tenementis prædictis in "*Bapchild*, unde locus, in quo ipsi supponunt transgres- "sionem prædictam fieri, est parcella; post [cujus mortem] "prædicti *Ricardus Bach* et *Will'us Holy* tenementa præ- "dicta unde, &c. intraverunt, et terram inde seminaverunt, ". . . *Thomas Claver* ut vir ejusdem *Godelinæ*, pro "eo quòd ad ipsum pertinuit habendum medietatem secun- "dum [consuetudinem] prædictam, intravit tenementa præ- "dicta, et medietatem bladorum super terram prædictam "seminatorum messuit, prout ei bene licuit, &c."

Defendant pleads the custom of gavelkind for the husband to have a moiety of the estate of his late wife, while he lives unmarried, and entitles himself by it.

The Plaintiffs reply, "Quod consuetudo de gavelkynd "talis est, quòd si hujusmodi viri et mulieres habeant exi- "tum inter se, quòd [tunc] hujusmodi viri habebunt me- "dietatem terrarum et tenementorum mulierum prædictarum, "dum tamen se tenuerint [non] maritatos, et si contingit "hujusmodi viros et mulieres non habere exitum inter se, "[tunc] post mortem mulierum prædictarum, non debent "habere aliquam partem terrarum et tenementorum muli- "erum prædictarum, [et dicunt] quòd prædicta *Godelina* "obiit sine hærede inter se et prædictum *Thomam Claver* "exeunte; et hoc parati sunt verificare, unde petunt judi- "cium et damna, &c."

Plaintiffs reply, That the custom is for the husband to have a moiety after issue had, but not otherwise, &c.

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* The roll being much damaged by wet, is obliterated in all the places between the [ ] and supplied only by the sense.

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Defendant rejoins, that the custom gives the husband a moiety, whether there were issue or not, and traverses the custom alleged by the plaintiffs.

Issue thereon.

"Et prædictus *Thomas* dicit, quòd consuetudo de gavel-"kind talis est, quòd sive hujusmodi [viri et mulieres] ha-"beant exitum, sive non, quòd viri post mortem earundem "mulierum, debent habere medietatem tenendam in formâ "superiùs per ipsum *Thomam* declaratâ; absq. hoc quòd "aliqua talis consuetudo habetur in gavelkynde, prout præ-"dictus *Ricardus Back* et *Will'us Holy* superiùs allegave-"runt; et de hoc se ponit super patriam, &c., et prædictus "*Ricardus Back* et *Will'us Holy* similiter. Ideo, &c. præ-"ceptum est vicecomiti quòd venire, &c. Ad quem diem "venerunt partes prædictæ, et vicecomes non misit breve. "Ideo sicut prius, &c. ad recognoscendum, &c." But there is no verdict entered.

And lastly,

Wood v. *Jefferies.*

In an ejectment between *Wood*, on the demise of *Walsh* and *Baker* against *Jefferies*, tried at the summer assizes for Kent in 1739, before Ch. Just. Lee, it was found to be the custom of Kent, that the husband, who has issue by his wife, shall be tenant by the curtesy of a moiety only of her gavelkind lands. And accordingly, *Baker*, the tenant by the curtesy, had a verdict for a part only. Indeed, the premises in question being of small value, the matter was not greatly contested; the proof of the custom was by two attornies of note, who gave evidence of the general reputation of the County, and nothing was attempted to be proved to the contrary.

Authorities to shew that the husband is entitled to a moiety as long as he lives unmarried, though no issue had.

I shall proceed to shew in the next place, that the custom of Kent, though less indulgent than the curtesy of England to such husbands as have issue by their wives, is more favourable than the common law to those that have none, giving them an equal advantage with the others, viz. *A moiety as long as they live unmarried.* And notwithstanding this be made a doubt, in the record last cited of Mich. T. 13 Rich. 2, yet, that case is, in some measure, an authority for the

custom; for, the defendant, who claimed to be tenant of a moiety, though no issue had, having taken possession of the premises, the not bringing on the cause to trial, was a kind of tacit acquiescence in his right. And though some of the foregoing records, which say, that *ratione prolis suscitatæ, &c. tenuit*, seem to make that a previous qualification, yet, they are properly explained and answered by the following authorities:

"If a man take a wife that has inheritance of gavelkind, "and the wife dies before him, let the husband have the "moiety of those lands and tenements, whereof she died "seized, so long as he holds himself a widower, without "doing any estrepement, waste, or exile, *whether there were* "*issue between them, or not;* and if he take another wife, "let him lose all." (Custumal of Kent, post.)

B. de Bendings v. *The Prior of the Holy Trinity, Canterbury.*

In a writ of dower brought for a moiety, in Itin. Kane. 25 Hen. 3 (to be found in the Appendix to Somner on Gavelk. 179), by *Burga* late wife of *Peter de Bendings* against the Prior of the Holy Trinity in Canterbury, the demandant *dicit*, "*quòd manerium est gavelkinde et partibile,* "*ita quòd*, Robertus de Valoignes *dominus de* Sutton, *qui* "*duxerat in uxorem* Matildam de Welles, *cujus hæreditas* "*illud manerium fuit, post mortem illius* Matildæ, *habuit* "*nomine* franci banci *medietatem illius manerii.*" And no mention is made of any issue between them.

Nor is having issue set out, as necessary to entitle the husband to a moiety, by the following record:

Roger le Linus v. *Cokin.*

Itin. Kanc. 39 Hen. 3, rot. 26, in dorso. "Assisa venit "recognitura si *Andreas Cokin*, custos terræ et hæredis "*Laurence* filii *Johannis le Bretun*, et alii, injusté et sine "judicio disseisiverunt *Rogerum le Linus* de libero tene- "mento suo in suburbio *Cantuar.* Et unde queritur quòd "disseisiverunt eum de *medietate* undecim acrarum terræ,

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The Plaintiff makes title as tenant by the curtesy of a moiety, by the custom of gavelkind.

"&c. Et dicit, quòd prædicta terra aliquo tempore fuit jus "et hæreditas cujusdam *Godelinæ* quondam uxoris suæ, et "ipse *Rogerus post mortem prædictæ Godelinæ, fuit in* "*seisinâ de medietate prædictæ terræ, ut de libero tenemento* "*suo, secundum consuetudinem Kanciæ,* per magnum tempus "quousq. prædictus *Andreas* et alii inde ipsum disseisiverunt.

"Et *Andreas* et alii veniunt, et *Andreas* dicit, quòd in- "justé tulit istam assisam, quia dicit, quòd prædictus *Rogerus* "nullum liberum tenementum potuit clamare in prædictâ "terrâ, post mortem prædictæ *Godelinæ* uxoris suæ, quia, "benè cognoscit quòd prædicta terra fuit jus et hæreditas "prædictæ *Godelinæ* uxoris suæ, sed dicit, quòd prædictus "*Rogerus,* antequam prædictam *Godelinam* desponsâsset, "concessit ipsi *Godelinæ* quòd si contingeret ipsam decedere "ante prædictum *Rogerum,* quòd idem *Rogerus* nihil cla- "mare posset in aliquâ parte prædictorum tenementorum "ratione *liberi banci* sui, sed prædicta tenementa descen- "dere deberent ad hæredes ipsius *Godelinæ;* et dicunt, quòd "hac ratione posuit se in seisinâ quædam *Lauretta* de præ- "dictis tenementis integré; unde dicunt, quòd si prædictus "*Rogerus* disseisitus sit de prædictis tenementis, per ipsos "non est disseisitus, immò per prædictam *Laurettam*; et "de hoc se ponit super assisam.

Verdict and judgment for the plaintiff.

"Juratores dicunt, quòd prædictus *Rogerus* per magnum "tempus *post mortem prædictæ* Godelinæ, *fuit in seisinâ de* "medietate *prædictorum tenementorum ut de libero banco* "*suo,* et postea venerunt prædictus *Andreas* et alii, et ipsum "de prædicta medietate ejecerunt; unde dicunt quòd præ- "dictus *Andreas* et alii prædictum *Rogerum* injusté disseisi- "verunt. Ideo consideratum est, quòd prædictus *Rogerus* "recuperet seisinam suam per visum juratorum, et prædictus "*Andreas* et alii in mîa."

Pasc. 16 Ed. 3, Fitzh. Aid, 129. It is pleaded, "that the "husband held the land of his wife by the usage of gavelkind, "though they never had any issue between them," and not denied.

Pasc. 19 Ed. 3, Aid, 144. It is pleaded, "that by the "usage of gavelkind in Kent, the husband shall, after the "death of the wife, hold the moiety of the lands of the in-

"heritance of the wife, as long as he lives unmarried." And it is mentioned in the case, that the wife died without issue.*

In the case of *Dane* v. *Johnson et al.* (Pasc. 4 Eliz. C. B. rot. 1022, Kanc. Co. Ent. 602), it is pleaded, "that the lands "are, and from time to the contrary whereof, &c. have been, "of the nature and tenure of gavelkind in the county of "Kent; and that the husband of *every* wife dying seized of "any lands or tenements in the said County, of the said "nature or tenure, in her demesne as of fee-simple or fee-"tail, according to the custom in the said County, for all the "time aforesaid used and approved, ought, and have used to "hold and enjoy the *moiety* of all such lands and tenements, "of which such wife died seized as aforesaid, after the death "of such wife so dying seized as aforesaid, during the life "of such husband, *if such husband lived sole and unmar-"ried*; and that the said *Nich.* was, and yet is seized of the "said moiety, with the appurtenances, in his demesne as of "freehold, as tenant thereof by the custom aforesaid."

It appears indeed by the above case, that the husband had issue by his wife, but that circumstance is not supposed to be necessary, the custom being pleaded in general for the husband of *every* wife.

"By the custom of gavelkind, a man shall be tenant by "the curtesy without having any issue." (Co. Litt. 30 a, 111 a.) And the same thing is agreed in *Browne* v. *Brookes* (2 Sid. 153), and *Wiseman* v. *Cotton.* (Raym. 76.)

"Tenant by the curtesy of Kent of gavelkind lands, whe-"ther he have issue or not, until he marry." (Noy's Max. 27.)

"By the custom of Kent, if the wife is seized of gavelkind "lands, and dies without having had issue by her husband, "he shall be tenant by the curtesy of half the lands, so long "as he lives unmarried; but if he marry again, he shall for-"feit his estate in the land." (Mich. T. 22 Car. 1, B. R. Style's Pract. Reg. 314, 322.)

"*Maritus uxoris decedentis, sive liberos ex eâ susceperit,* "sive non, *terras hujus generis* [*gavelkind*] *accipit ex semisse,* "*quamdiu manet innuptus.*" (Tho. Smith de Rep. Angl. 109.)

* In the printing of that case the words *le Baron* are misplaced.

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Add to these, this verdict in the very point:

W. le Pede v. *W.deDagenham.*

"Ass. in Com. Kanc. 16 Ed. 2. Assisa venit recognitura "si *Will'us de Dagenham* et *Johannis de Estlond*, injusté, "&c., disseisiverunt *Will'um le Pede* de libero tenemento "suo in *Stoke*, in *Hoo*, et villis *Sanctæ Mariæ*, *Sanctæ Wer-* "*burgæ* et omnium sanctorum in *Hoo* post primam, &c., et "unde queritur, quod disseisiverunt eum de *medietate* tri- "ginta quinque acrarum terræ, et quatuor viginti acrarum "marisci cum pertinentiis.

Tenants make title as heirs to their mother.

"Et *Will'us de Dagenham* et *Johannes* veniunt, et re- "spondent ut tenentes, &c., et dicunt, quòd assisa inde inter "eos fieri non debet, quia, dicunt quòd quædam *Margeria* "mater ipsorum *Will'i* et *Johannis*, cujus hæredes ipsi sunt, "aliquando tenuit prædicta tenementa in visu posita, et inde "obiit seisita in dominico suo, &c., secundum consuetudinem "de *gavelykynde*, post cujus mortem ipsi intraverunt ut "hæredes &c., et prædictus *Will'us Pede*, qui fuit vir ipsius "*Margeriæ*, intrusit se in prædictis tenementis, et ipsi hoc "permittere noluerunt *pro eo quod non fuit exitus inter eos;* "unde petunt judicium si de hac intrusione assisam inter eos "habere debeat.

Plaintiff replies, that he is entitled to a moiety as tenant by the curtesy, by the custom of gavelkind, though no issue had.

"Et *Will'us Pede* dicit, quòd secundum *consuetudinem de* "*gavelykynde*, quilibet vir habere debet *medietatem* terrarum "et tenementorum, quæ fuerunt uxoris suæ de hæreditate "suâ, ad tenendum ut liberum tenementum suum dummodo, "&c., unde dicit quod secundum consuetudinem prædictam, "ipse intravit in prædicta tenementa, sicut ei bene licuit, et "inde fuit seisitus ut de libero tenemento suo, quousq. præ- "dicti *Will'us Dagenham* et *Johannes* ipsum inde injusté "disseisiverunt, &c. Et *Will'us* et *Johannes* dicunt, quòd "non est hujusmodi consuetudo in *Kanciâ* de tenementis de "*gavelkynde;* et de hoc ponunt se super assisam, et præ- "dictus *Will'us Pede* similiter: ideo capiatur assisa.

Verdict finds the custom accordingly.

"Juratores de assensu partium electi dicunt super sacra- "mentum suum, quòd *consuetudo de gavelykynde talis est,* "*quòd quilibet vir habere debet post mortem uxoris, medie-* "*tatem omnium terrarum et tenementorum, quæ fuerunt* "*ipsius uxoris de hæreditate suâ, sive habeatur exitus, sive*

"*non, ad tenendum ut liberum tenementum suum, quousque* "*ea forisfecit secundum consuetudinem prædictam.* Et quia "prædictus *Will'us Dagenham* et *Johannes* satis cognove- "runt in curiâ, quòd prædictus *Will'us Pede* seisitus fuit de "tenementis in visu positis, et per eos disseisitus, ideo con- "sideratum est, quod recuperet inde seisinam suam per visum "recognitorum, et similiter damna sua, quæ taxantur per "juratores ad tresdecim solidos et quatuor denarios; et "*Will'us de Dagenham* et *Johannes* committuntur goalæ. "Postea fecerunt finem cum domino rege pro quadraginta "denariis, &c."

Judgment for the plaintiff.

And to close all, this custom, as set down in the *Custumal*, more beneficial in one respect than the common law, that the husband shall hold over, though he never had issue by his wife, but less in others, viz., that he shall have but one half, though he have issue, and that with a prohibition of second marriage, Mr. Lambard, who was well acquainted with the state of the County, affirms to have holden place, and to have been put in practice in his time. (Peramb. $\frac{6}{5}\frac{1}{5}\frac{5}{5}$.) And, according to the best inquiry I have been able to make, the same is the general reputation of the County at this day.

The rise of this custom.

There is a law among those of Hen. 1, that may give some colour to a conjecture, that this custom took its rise from the common source of our gavelkind customs, the old common law: It is the 70th law of that King, where, after mention of the wife's dower in case she survived her husband, it is said, "*Si mulier absque liberis mo-* "*riatur parentes* ejus cum* marito *partem suam* "dividant."

* Here the word *parentes* signifies kindred, or relations in

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Of waste.

Tenant by the curtesy by this custom, has no more power of committing waste, than such tenant by the common law. (Custumal of Kent, post; Itin. Kanc. 55 Hen. 3, rot. 51, ante, 79; Lamb. Peramb. $\frac{615}{555}$.)

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general, according to the signification of the French word *parent*, and is so used several times in the same laws. (Vide 75th law, Hen. 1; et vide stat. Merton (20 Hen. 3), c. 6; Litt. sect. 108.)

CHAP. II.

OF DOWER.

THE customary dower of lands in gavelkind, was formerly called by the name of *free bench.* (Itin. Kanc. 39 Hen. 3, rot. 4, and rot. 19, post; Itin. Kanc. 55 Hen. 3, rot. 60; 25 Hen.3, App. to Somn. 178.)

The several qualities whereof different from the common law, may be considered under the following heads:

1st, Of what part the widow shall be endowed. 2nd, The conditions by which her estate may be defeated. 3rd, Of what things she shall be endowed. 4th, What remedies she may have for her dower. 5th, The manner of demanding this customary dower. 6th, The manner of assignment. 7th, Of waivure of her customary dower.

Of what part the widow shall be endowed.

1st. By the custom of Kent, the wife, after the death of her husband, shall have for her dower, a *moiety* of all his lands and tenements of the nature of gavelkind. (Lamb. Peramb. $\frac{615}{555}$; Stat. de Consuet. Kanc. post; Stat. de Prærog. Regis (17 Edw. 2), c. 16; 7 Edw. 2, Mayn. 236; Itin. Kanc. 8 Edw. 2, Assize, 386; 13 Edw. 3, View, 104; F. N. B. 150, O; Cro. Eliz. 121, 825; 21

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Edw. 4, 54 a; Cro. Car. 562; Co. Litt. 33 b, 111 a; T. Jones, 6; 1 Sid. 138; 2 Sid. 154; Raym. 76; Dav. 50; Somn. 48, 53, 146; and numberless instances in the Kentish Iters.)

On what conditions.

2nd. But she holds not her dower absolutely for life, but only as long as she lives chaste (21 Edw. 4, 54 a; *Hunt* v. *Gilburne*, Cro. Eliz. 121; *Davies* v. *Selby*, ibid, 825; Tho. Smith de Rep. Angl. 109; Noy's Max. 28; *Lady Cobham* v. *Tomlinson*, T. Jones, 6); and unmarried. (Itin. Kanc. 55 Hen. 3, rot. 57; *Joan Helles's* case, Plac. Ass. in Com. Kanc. 17 Edw. 2; Cro. Eliz. 121, 825; Noy's Max. 28; T. Jones, 6; Co. Litt. 33 b, 111 a; Lamb. 556; 8 Edw. 2, Mayn. 284; 2 Edw. 4, 19; Moor, 260.) If she commit fornication in her widowhood, or take a husband after, she shall lose her dower. (Stat. 17 Edw. 2, De Prærog. Reg. c. 16.)

Nor is it material by our custom, whether the taking husband be before, or after dower be assigned; for, if she marry before, she shall not afterwards be endowed; if after assignment, the heir may enter upon her. (Lamb. Peramb. 560; Somn. 146.)

"Per consuetudinem quæ in diversis locis pro lege obser-
"vatur, si, cum fuerit ei dos assignata, vel in Com. Kanc.
"ante assignationem nupserit alicui, statim amittit terram,
"quam tenet nomine dotis de gavelkind. Et de hac materiâ
"inveniri poterit de termino *S. M.* anno regis Hen. 2, post
"guerram, in Com. Kanc. Et sive seysinam habuerit, sive
"non, si post mortem viri inventa fuerit *habens in utero con-*
"*ceptum* ab alio quam viro suo, si nupserit, et licet nupta
"non sit, *si vir inveniatur, vel puer, vel uterque*, dotem
"amittet." (Bract. lib. 4, 313 a.)

The record above cited of M. 2 R. H. Mr. Somner takes to be the case of *Isabella de Gravenel*, mentioned a little higher in Bracton, p. 308 b, where the custom is thus pleaded:

"Quod sive [vidua] fuerit in seysinâ, sive non, si post "mortem viri sui alium capiat, amittere debet dotem, si in "seysinâ fuerit; si autem extra seysinam, debet amittere "clameum."

How the incontinency must be proved in order to a forfeiture.

But though chastity, as well as a single life, be a condition of her estate, yet it may be a question, whether the custom require not a particular kind of proof of her incontinency, before a forfeiture shall be incurred.

Mr. Lambard (Peramb. $\frac{6}{5}\frac{1}{5}\frac{6}{6}$), as to this matter says:

"Tenant in dower has some conditions waiting on her "estate; one, that she shall not marry at all; another, "that she take diligent heed, that she be not found with "child begotten in fornication, &c., so that the sin of secret "lechery is but in a sort forbidden, seeing that by the cus- "tom, she forfeits not in the latter case, unless the child be "born and heard to cry, and that of the country people "assembled by hue and cry."

And he is supported in his opinion by the *Consuetudines Kanciæ:*

"Ele eit le moytie de celes terres et tenements a tener "tant come ele se tient * veuve, ou de enfanter soit attaint "per le ancient usage, ceo est ascavoir que quant ele enfaunt, "e le enfaunt soit oy crier, e que le hu e le cry soit leve, e "le pais ensemble, e eyent viewe de la enfaunt e de la mere, "adonks perde son dowere entierment, *e autrement nyent*, "tant come ele se tient veuve." Post.

* Or as the Customal printed by Tottel has it, *veufue ou desenfantee, de enfant soit atteint per auncientz usages, ceo est ascavoir, &c.*

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And this is further verified by the following verdict:

Roberge at Combe v. *Thomas at Combe.*

Trin. T. 17 Edw. 3, coram Rege, rot. 32, Kanc. * An assize brought by *Roberge*, late wife of *John at Combe*, against *Thomas*, son of the said *John*, for a rent of 15s., and other tenements in Woodnesborough, Folkstone, and Ash, near Sandwich. The tenant pleads, that the rent, &c., is gavelkind, and assigned by him to the plaintiff as her dower; "et quòd talis est usus de gavelkynde, quòd "si viduæ post mortem maritorum suorum se maritaverint, "vel aliquem puerum in *seneucia* † peperint, et puer ille "visus fuit, aut cognitus, vel vagiens sive clamans audiatur, "statim viduæ illæ secundum usum prædictum, dotem suam "amittent et forisfacient; et dicit quòd prædicta *Robergia*, "postquam ipsa dotata fuit de redditu prædicto et prædictis "tenementis, unde, &c., peperit quandam filiam *Johannam* "nomine in seneuciâ apud Reculvre, generatam per quen- "dam *Simonem Petitz*, quæ quidem filia visa fuit ibidem et "cognita, per quod prædicta *Robergia* redditum prædictum, "&c., secundum usum prædictum forisfecit, unde petit ju- "dicium, &c."

Bar, that the premises were the dower of the plaintiff, and by the custom of gavelkind forfeited by her having a child.

Reply, that by the custom the dower is not forfeited, unless the child be found at its birth by hue and cry within the house of which the woman is endowed.

The plaintiff, "non dedicit quin ipsa peperit filiam in "seneuciâ, sed dicit quòd usus de gavelkynde non est talis, "qualis prædictus *Thomas* superius allegavit; quia dicit "quòd usus gavelkyndensis talis est, quòd viduæ dotatæ, "post mortem virorum suorum prolem *peperentes* in seneuciâ, "dotem suam amittere non debent, nisi proles illa inveniatur "vagiens sive clamans infra quatuor muros tenementorum "illorum, de quibus viduæ sic fuerunt dotatæ, et quòd ipse, "cui tenementa illa post mortem hujusmodi viduarum reverti "debent, recentèr post nascentiam illius prolis hutesium et "clamorem super prolem illam levaverit; et hoc parata est "verificare per assisam, &c.

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* The same record occurs Int. Plac. Ass. Kanc. 10 Edw. 3, and was removed into B. R. by *certiorari* in order to execution.

† *Seneucia* in this record signifies widowhood. (Co. Litt. 33 b, in Marg.)

"Et prædictus *Thomas* dicit, quòd usus de gavelkynde est "talis, quòd in *quocunque loco comitatûs prædicti* hujusmodi "viduæ peperint in seneuciâ, et proles illa per quemcunque "visa vel cognita, vel vagiens sive clamans audiatur, et "clamor et hutesium leventur, quòd viduæ illæ secundum "usum prædictum dotem suam amittere debent et forisfient; "et hoc petit quòd inquiratur per assisam; et prædicta "*Robergia* similiter. Ideò capiatur assisa.

The tenant rejoins, that wheresoever within the County the child is found by hue and cry, the dower is forfeited.

"Juratores dicunt, &c., quòd *talis est usus de tenementis,* "*quæ tenentur de gavelkinde in comitatu isto, viz. quòd si* "*viduæ post mortem virorum suorum se maritaverint, vel* "*filium vel filiam in seneuciâ peperint, dotem suam amittent* "*et forisfacient, in quocunque loco infra comitatum istum,* "*proles illa fuerit inventa vagiens sive clamans; ita tamen* "*quòd ille, cui hujusmodi tenementa sic dotata reverti debent,* "*in propriâ personâ suâ, vel per ejus custodem sive amicum,* "*si ipse fuerit infra ætatem, recentèr post nascentiam illius* "*prolis, hoc est dum proles illa fuerit sanguinolenta, venerit,* "*et super prolem illam clamorem et hutesium levaverit;* et "petunt discretionem justiciariorum, &c. Juratores quæ- "siti, ex quo non est dedictum per prædictam *Robergiam* "quin ipsa peperit filiam in seneuciâ, si prædictus *Thomas* "in propriâ personâ suâ, vel per ejus custodem, sive per "aliquem amicum suum, recentèr postquam prædicta *Robergia* "sic peperisset, levavit clamorem et hutesium super filiam præ- "dictæ *Robergiæ*, necne, dicunt, quòd non. Ideò considera- "tum est, quòd prædicta *Robergia* recuperet seisinam suam, "&c."

The jury find the custom accordingly.

But that the tenant did not raise the hue and cry.

Judgment for the plaintiff.

And in Co. Litt. 33 b, it is said, "By the custom of "gavelkind, the wife shall be endowed of a moiety, so long "as she keeps herself sole, and *without child.*"

But contrary authorities are not wanting to shew, that the condition is still more strong, and that not only child-bearing, a casual consequence of fornication, and the detection of it in this public manner, but the commission of the act itself is a forfeiture of her estate; and so it was found by the following verdict:

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Godefrey's case.

Pasch. 4 Edw. 1, C. B. rot. 21, Kanc. (and not rot. 2, as is in 1 Rolle's Abr. 558.) A writ of dower brought for a moiety of lands in Kent, by *Margery*, the widow of *John Godefrey*. The tenant pleads, that it is the custom of gavelkind, *quod vidua amittet dotem, si fornicata vel maritata fuerit*, and that the demandant had, after the death of her husband, a son named *William*, by one *William de Emesby*. The demandant confesses the custom, but replies, "quòd nunquam fuit convicta secundum legem de gavelkind; "dicit enim, quòd ipse inquisivisse debuit per insidias, "quando ipsa fuit in parturiendo, et tunc debuisset ipsam "cum puero suo cepisse cum clamore et hutesio, &c." The tenant rejoins, "quòd ipsa fornicata est ut prædicitur, et "quòd ipsa non debet convinci in formâ prædictâ, et de hoc "se ponit super patriam; et *Margeria* similiter. Ideò "venire faciat, &c. Postea jurata dicunt, quòd prædicta "*Margeria* post mortem prædicti Johannis viri sui, fornicata "est cum prædicto *Will'o de Emesby*, de quo conceperat "prædictum *Will'm* filium suum, et *quòd lex et consuetudo "de gavelykynde talis est, quòd si uxor post mortem viri sui "nupserit se, vel fornicata fuit, amittit dotem suam; et quòd "non necesse est quòd ipsa capiatur cum puero suo in par-"turiendo cum hutesio et clamore.* Ideò consideratum est, "quòd *Will'us* et alii eant inde sine die, et prædicta *Mar-"geria* nihil capiat, &c. Sed sit in mîa, &c."

Verdict finds the custom of gavelkind to forfeit dower for fornication, though no hue and cry, &c.

To this may be added,

Northwoode's case.

Trin. T. 5 Edw. 2, coram Rege, rot. 4, Kanc., in which *Alice*, late wife of *Walter Northwoode*, brought an action of trespass against *Henry Northwoode*, and three others, for breaking and entering her house at Meopham, &c. The defendants pleaded, "quòd mos et consuetudo de gaveling-"kinde in partibus illis talis est, quòd uxor post mortem viri "sui, *quamdiu se benè et honestè gesserit*, habebit medieta-"tem omnium terrarum et tenementorum quæ fuerunt præ-"dicti viri sui, *et si faciat transgressionem* cum aliquo homine "post mortem viri sui, amittat medietatem terrarum, &c., et "pro eo quòd prædicta *Alicia fecerat adulterium* cum quo-"dam *Johanne le Tayllur*, et habuit quendam filium *Johan-*

Plea, that the plaintiff being tenant in dowerin gavelkind, forfeited by the custom for fornication.

"*nem* nomine, ipsi *Henricus* et alii intraverunt domum, &c., "secundum consuetudinem prædictam :" *Henry* having married the heir of the husband. "Et prædicta *Alicia* dicit, "quod *nullam transgressionem fecit* cum prædicto *Johanne* "*le Tayllur*, nec cum aliquo alio ; sed prædicti *Henricus* et "alii de injuriâ suâ propriâ, &c., et hoc petit quòd in- "quiratur per patriam ; et prædicti *Henricus* et alii similiter. "Ideò veniat inde jurata coram Rege a die Sancti Mich. in "xv, dies ubicunq. &c.; ad quem diem prædicta *Alicia* "non est prosecuta."

The plaintiff is nonsuited.

And the words of Bracton above cited, *licet nupta non sit, si vir inveniatur, vel puer, vel uterque, dotem amittet*, are a further evidence, that she may forfeit her dower without being convicted of child-bearing by the view of the country.

Ante, p. 96.

The statute *de Prærogativâ Regis* (17 Edw. 2, c. 16), is likewise general, that *if she commit fornication in her widowhood, or take husband after, she shall lose her dower.* And to these may be added the other authorities above cited, which say generally, that she shall hold the moiety so long as she lives chaste. And indeed, could the widow who breaks this rule; avoid the danger of a forfeiture, by withdrawing to lie in, out of the County, the condition would be but of very little effect.

Ante, p. 96.

Who may take advantage of the forfeiture.

These restrictions to chastity and a single life, being limitations which determine the estate *ipso facto*, without entry, not the heir only, as in the case of a condition, but any stranger who is interested, may take advantage of the forfeiture. (Co Litt. 214 b.)

Of emblements after forfeiture.

If tenant in dower of gavelkind sows the land, and afterwards forfeits her dower by marriage or

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fornication, the heir shall have the emblements, for her estate is determined by her own act. (2 Inst. 81; [Co. Litt. 55 b; *Bulwer* v. *Bulwer*, 2 B. & Ald. 470.]) So, if she makes a lease for years, and then takes husband, the lessee shall not have the emblements; for, though his estate is determined by the act of another, yet, he shall not be as to the heir, in a better condition than his lessor was. (*Oland's* case, 5 Rep. 116, which was the case of a feme copyholder *durante viduitate.*) *(d)*

Where an action lies for calling tenant in dower in gavelkind a whore.

As tenant in dower of gavelkind lands, holds only while she remains sole and chaste, she may maintain an action against any person calling her a whore, if done to impeach her estate, within the reason of the case of *Bois* v. *Bois.* (1 Sid. 215; S. C. 1 Lev. 134.) Action on the case for saying to a widow, who held an estate while she continued sole and chaste, that she was a whore,

(d) In a note to this case by the learned editors (Messrs. Thomas and Fraser) of the last edition of Coke's reports, they say, "In Rolle's Abr. 727, Emblem. 10, it is laid down, that the lessee shall have the emblements, for her act shall not prejudice a third person, and *Oland* v. *Burdwick* (Cro. Eliz. 460) is cited, in which case it appears that the law was so laid down by Clench, and assented to by Popham (dissent. Fenner); the law as laid down by Rolle, is adopted by Blackstone in his Commentaries, vol. 2, p. 124." And in *Bulwer* v. *Bulwer* (2 B. & Ald. 470), Ch. Just. Abbott observed, "The general rule of law applicable to cases of this description is, that where a tenant of land has an uncertain interest, which is determined either by the act of God, or the act of another, there he shall have emblements; but that is not so, where the tenancy is determined by his own act."

and that he would throw her out of her living, falsely and maliciously, with an intent to oust her of her estate: moved in arrest of judgment, that no special damage being laid, the words were not actionable; but the Court held, that the words, coupled with the declaration of the party, import damage in themselves in respect of her estate.

Of the custom not to forfeit dower for felony, see post, chap. 4.

Of what things she shall be endowed of a moiety.

3rd. As a woman is to be endowed at common law of lands and tenements (Litt. Sect. 36; Co. Litt. 32 a), so is she dowable of all lands and tenements in gavelkind, as appears by the Custumal of Kent, post. And the writ of dower in this case, as well as the other, is *de libero tenemento*, of the husband; from whence it might naturally be inferred, that the dower is equally extensive in both cases.

Whether of a bailiwick, or profits of a fair.

But though a woman shall be endowed at common law, of the third part of the profits of a fair (Co. Litt. 32 a; Fitz. Dower, 81), yet it is said, that if the custom be, that a woman shall have for her dower, the moiety of all the lands and tenements which were her husband's, holden in socage within such a precinct, if the husband had a bailiwick, or fair in fee during the coverture, holden within the same precinct, the wife shall not have the moiety thereof for her dower, *because it is no tenement*, and a custom shall be taken strictly. (Perk. Sect. 435; Lamb. $\frac{619}{558}$; Noy's Max. 28; 2 Sid. 139, per Newdigate, Just.;

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and 12 Edw. 2, Dower, 157, seems to be to the same purpose, though the case is somewhat obscure.) But otherwise it is of a bailiwick or fair appendant to a manor, or land holden in socage within such precinct. (Perk. Sect. 436; Lamb. $\frac{6}{5}\frac{1}{5}\frac{9}{9}$.)

The first is undoubtedly true, if it be understood only of such profits of a fair, as arise merely from the franchise, as toll, &c., and issue not out of the land; for, these not being holden by any tenure, cannot be of the nature of socage, and consequently not gavelkind; but as such profits of a fair, which are rather issuing from the land than from the franchise (as pickage and stallage), may be of the nature of gavelkind with regard to the inheritance, there is no reason why the widow should not have equal advantage with the heirs, and be entitled to a moiety of them, as incident to the soil of which she is endowed, they coming properly under the description of the word *tenements*, which is a very large term, comprehending, not only lands, and other corporeal inheritances, which are, or may be holden, but also, all inheritances issuing out of any of them, or concerning, or annexed to, or exercise-able within the same, though they lie not in tenure; as offices, rents, commons, profits *apprender* out of lands, and the like, wherein a man has any frank-tenement, and whereof he is seized *ut de libero tenemento.*

Ante, 47,48.

Co. Litt. 6 a, 19 b; [2 Bl. Com. 17; 4 T. R. 671, and cases there cited.]

And accordingly, dower was demanded of the moiety of stallage, arising from a fair holden on

gavelkind lands; and it was adjudged good, without saying a moiety of the profits of the stallage; for the stallage is the profits, and a woman may be endowed of a moiety of stallage. (11 Edw. 3, Fitzh. Dower, 85.)

Of common in gross.

Dower demanded of a moiety of pasture for sixteen oxen, and six cows, &c., to common in five hundred acres of wood: exception taken, that the writ is *de libero tenemento*, and the demand of common of pasture, and therefore, the demand not warranted by the writ; but the Court held it good, for that, if she could not recover by this writ, and by this demand, she would be without remedy. (13 Edw. 2, Dower, 161; S. C. Mayn. 405.)

Of a rent.

Rent or common out of land in gavelkind, or borough-english, shall be of the nature of the land, so as a wife shall be endowed of a moiety, &c., contrà of a rent or common newly granted, and therefore, she shall be driven to shew, whether it is common newly granted, or continued time out of mind, notwithstanding she allege, that by the custom of the County, the wife shall have a moiety of her husband's freehold in dower. (4 Edw. 3, 32; Fitzh. Dower, 113; Bro. Custom, 58.) But as it is now settled, that a rent, though newly granted out of gavelkind land, shall follow the nature of the land, there is the same reason, that the wife shall be endowed of a moiety, as that all the sons shall inherit.

Ante, 49.

Of tithes impropriate.

That a woman shall not be endowed of a

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moiety of tithes impropriate issuing out of lands in gavelkind, vide ante, p. 52, and n. (*o*).

What remedies lie for this dower.

4th. A woman shall have the same remedies for this customary dower of gavelkind, as for lands at common law; as a writ of dower *unde nihil habet* (*e*) in the common form, *quòd reddat ei rationabilem dotem, &c. de libero tenemento, &c.*, and in her count, she shall demand the moiety by the custom. (Mayn. Edw. 2, 405; 30 Edw. 3, 26 a.)

[V. *Watson* v. *Watson*, 10 Com. B. Rep. 3.]

As the statute of Merton, 20 Hen. 3, c. 1 (which gives to the wife deforced of her dower, where the husband died seized, damages to the value of the mean profits of her dower), is construed to extend to copyholds, where by the custom the wife is dowable; for that, when she is endowed, she shall have all incidents to dower (*Shaw* v. *Thompson*, 4 Rep. 30 b; Co. Litt. 33 a), it seems that with equal reason at least, it will extend to dower of gavelkind lands. And Fleta (lib. 5, c. 24, fol. 344), speaking of this provision of the statute of Merton, and of writs of dower *unde nihil habet*, says:

"Primum commune breve, ut suprà, per quod petitur "tertia pars tenementi, quod fuit viri sui die quo eam de- "sponsavit, et postea, et aliquando medietas, sicut de socagio;

(*e*) The writ of dower *unde nihil habet*, is now seldom resorted to (see 3 Steph. Com. 465, 2nd edit.), as the Court of Chancery possesses a concurrent jurisdiction with the common law Courts in all cases of assignment of dower. (*Mundy* v. *Mundy*, 2 Ves. Jun. 122; *Curtis* v. *Curtis*, 2 Bro. Ch. cases, 620.)

"non tamen de omnibus socagiis, sed de antiquis, et de iis "de quibus mulieres dotari consueverunt secundum loci et "patriæ consuetudinem: Quod quidem breve quandoq. sit "clausum, cum mulieres nihil habent omnino, et quandoq. "patens, cum aliquid habuerint, et aliquid defecerit. In "brevi autem clauso adjudicantur damna mulieribus, sed in "patenti non."

Of the manner of demanding dower of gavelkind lands.

5th. As dower of a moiety is against common right, some cause must undoubtedly be alleged for it in the demand. (Fitzh. Dower, 64, 65; 7 Edw. 3, 10; 10 Edw. 3, 35; 13 Edw. 3, Voucher, 20; 30 Edw. 3, 26 a.)

But the question is, in what manner such special cause must be alleged:

It is said in 5 Edw. 4, 8 b, that where a woman is to be endowed of a moiety of gavelkind lands, it is sufficient to shew the custom without prescribing in it. (Fitzh. Custom, 4.) *

In 2 Edw. 4, 19, dower is demanded of a moiety of 24 acres of land, for that the land is of the tenure of gavelkind, *et secundum consuetudinem in Com. Kanc. ab antiquo usitatam*, women ought to be endowed of a moiety of such lands; the tenant prayed judgment of the demand, because it was not said, according to the custom *a tempore a quo non existit memoria usitatam.* But the Prothonotary certified that the other was the constant course, and the Court said, they well knew there was such a custom, and therefore awarded that the tenant should answer.

* The book itself is misprinted, the word *nemi* before *prescriber* being omitted.

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And there are several precedents of demands of dower in Kent in this manner, in Rast. Ent. 235 a, 238 b, 239 b.

But it has been of later times the more common way, to demand dower of gavelkind lands in Kent, according to the custom *time out of mind* used, as appears by the precedents, Old. Ent. 109; Rast. 237 a; Co. Ent. 248; 1 Brownl. Decl. 112; Rob. Ent. 267, 268, 285. And certainly this is the more advisable and safe way of pleading, since the opinion of the Court in the cases of *Launder* v. *Brooks*, and *Wiseman* v. *Cotton*, that they will not take notice of the particular customs annexed to gavelkind lands, unless specially pleaded.

Ante, 25.

How dower of a moiety is to be assigned.

6th. Mr. Lambard (Peramb. $\frac{6}{5}\frac{1}{5}\frac{2}{9}$), thinks, that this customary dower differs from the common law in the manner of assignment; for, that if the wife recover her dower at common law, she ought of necessity to be endowed by metes and bounds; but in dower after the custom, she may very well be endowed of a moiety, to hold in common with the heir who enjoys the other half. And in this he is followed by Mr. Noy in his "Maxims," p. 28.

But the instance put in Perkins, tit. "Dower," pl. 412, which Mr. Lambard cites as his authority for this position, is only of an endowment of the wife by the heir, with her agreement to hold in common; and this is good by her assent, and 8 Edw. 2, Itin. Kanc. Fitzh. Entre, 75, is to the same purpose (though in truth, the case was in 6 Edw.

2, Itin. Kanc., and is more clearly reported among cases of that *Eyre*, given by Ch. J. Hale to *Lincoln's Inn*), where Spigurnel, Just. (who gave the rule) holds, that the law will well suffer the heir to assign dower to his mother, to hold a moiety in common with him *per mi et per tout*, but that it would be otherwise, if she were to recover her dower by judgment.

Style, 276; 1 Roll's Abr. 682, X. pl. 3.

And though the consent of both parties may take away the necessity of an assignment in severalty, as well in dower of a third part as of a moiety, yet it is certain, that where the wife recovers this customary dower by course of law, the sheriff ought to assign it by metes and bounds, equally as in the case of dower at common law; for it is expressly holden in the case of *Davies* v. *Selby* (Cro. Eliz. 825), that the widow shall have the moiety of gavelkind lands by assignment in severalty, and cannot hold in common. And so in 1 Keb. 583, that feme tenant of a moiety in dower by the custom of Kent, doth recover by metes and bounds, and is no tenant in common, unless she were the wife of a tenant in common.

Roger le Bonde's case.

Itin. Kanc. 39 Hen. 3, rot. 19, in dorso. In a writ of right, "*Jordanus* et *Godelina* dicunt, quòd non possunt "respondere; quia prædicta *Godelina* dicit, quòd ipsa nihil "clamat in prædicta terrâ nisi nomine *liberi banci* sui de "dono cujusdam *Rogeri le Bonde*, patris prædicti *Jordani*, "et quorundam *Gilberti* et *Richardi*, cujus hæredes ipsi sunt; "et dicit, quòd ipsa, et prædicti *Jordanus*, *Gilbertus*, et "*Richardus* tenent prædictam terram *in communi pro indi-*"*viso; ita quòd, liberum bancum suum nondum ei assignatum* "*est*."

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And Littleton (sect. 43), speaks of dower of a moiety according to the custom, *to hold in severalty*, which may be a sufficient answer to what is said *obiter* by Jerman, Just. in *Booth* v. *Lambert* (Style, 277), that if dower be of a third part, it ought to be by metes and bounds generally, but if of a moiety, it is not so.

Trin. T. 22 Jac. 1, rot. 3286; 1 Brownl. Decl. 112. The judgment in dower of a moiety of gavelkind lands is, "to hold "to the widow in severalty by metes and bounds;" though it is not necessary that the judgment be so particular.

1 Keb. 583.

Indeed, if there be two coparceners in gavelkind, and one takes a wife and dies before partition made, the widow must of necessity be endowed of the moiety of a moiety, to hold in common; in like manner as at common law, the widow of a tenant in common shall be endowed of a third part of a moiety, to hold in common with the heir and the other tenant, for that in this case, her dower cannot be assigned by metes and bounds. (Litt. sect. 44.)

This distinction is supported by the reason of the law in other cases: The statute Westm. 2 (13 Edw. 1), c. 18, enacts, that the sheriff shall upon an *elegit*, deliver to the plaintiff a moiety of the land of the debtor *(f)*; and the construction upon this has been, that he shall deliver the moiety by metes and bounds, unless the defendant be a joint-tenant, or tenant in common; and then this must be specially set forth in the

(f) See now the stat. 1 & 2 Vict. c. 110, sec. 11.

return. (Hutt. 16; 1 Brownl. 38; *Sparrow* v. *Mattersock*, 1 Vent. 259.)

Whether the customary dower can be waved for dower at common law.

7th. Mr. Lambard puts a question, whether a woman entitled to dower in gavelkind, may wave her dower of a *moiety* after this custom, and bring her action to be endowed of a *third part* at common law, and so exempt herself from the danger of the customary conditions, or not? And he mentions, that he once heard two reverend Judges of opinion, that the woman was at liberty to demand her dower of a third, or of the moiety; but that it was uttered by them on sudden speech, and not on studied argument. (Peramb. $\frac{620}{559}$, $\frac{621}{560}$.) And he seems to mean the opinion of Anderson, and Windham, Justices (reported 1 Leon. 62), which, as it was a sudden opinion, so it is contrary to both the former and later resolutions:

Thom. de Kanciâ v. *J. de Ripariis.*

Plac. Ass. 52 Hen. 3, in Com. Kanc. int. ass. de divers. Com. rot. 17. "Præceptum fuit vicecomiti, quod venire "faciat hîc ad hunc diem juratores assisæ novæ disseisinæ, "quam *Thomas de Kanciâ* et *Cæcilia* uxor ejus arrianave- "runt coram *Roberto Fulcone* versus *Johannem de Ripariis*, "*Will'um de Tracy*, *Radulphum de Bray*, *Johannem de* "*Tracy* et *Margeriam* uxorem ejus, de tenementis in *New-* "*ington*, viz. de *tertiâ parte* unius carucatæ terræ, ad certifi- "candum de quibusdam articulis assisam prædictam tan- "gentibus.

Count, that plaintiff in the original assize recovered a *third part* of a carve of land, as her dower; and that by the

"Et prædicti *Thomas* et *Cæcilia* non venerunt, et præ- "dicti *Johannes*, *Will'us*, *Radulphus*, et *Johannes* venerunt, "et dicunt, quòd prædicti *Thomas* et *Cæcilia* per prædictam "assisam recuperaverunt seisinam suam de prædicto tene- "mento, ut *dotem* ipsius *Cæciliæ*; et dicunt, quòd consuetudo "comitatûs *Kanciæ* de tenemento, quod tenetur in *Gave-*

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custom of Kent, she forfeited by marrying again.

"*lykende*, talis est, quòd quamcito mulier, quæ dotata est de "hujusmodi tenemento, nupserit se alicui, quòd ipsa amittat "dotem suam de tenemento, quod tenetur in *gavelikende;* "et quia prædicta *Cæcilia* nupsit prædicto *Thomæ*, præ- "dictus *Will'us de Tracy* seisivit prædictam *tertiam partem* "in manum suam, ratione prædictorum *Johannis* et *Mar-* "*geriæ*, qui sunt in custodiâ suâ, ut jus et hæreditatem ipsius "*Margeriæ*, sicut ei bene licuit per prædictam consuetudi- "nem; unde dicunt, quòd assisa prædicta minus sufficienter "examinata fuit super prædicto articulo.

The jury find accordingly.

"Et Juratores examinati super isto articulo dicunt, quòd "prædictum tenementum, &c., tenetur in *gavelykende*, et "quòd consuetudo de tenemento, quod tenetur in *gavele-* "*kende*, talis est sicut prædictum est, viz. quòd siqua mulier "dotata de tenemento, quod tenetur in *gavelekynde*, nupserit "se alicui, quod amittat dotem suam; et quod liceat war- "ranto dotis seisire prædictam dotem in manum suam. Et

Judgment.

"ideò consideratum est, quòd prædictus *Will'us de Tracy*, "ratione custodiæ prædictorum *Johannis* et *Margeriæ*, reha- "beat seisinam suam, &c."

Exception taken to the demand of dower of gavelkind land in Kent, because it was of a third part, and the count was amended, and made of a moiety. (2 Edw. 4, 19.)

Hunt v. *Gilburne.*

Dower of gavelkind lands in Kent, and demanded the third part of the land of her late husband; the defendant pleaded,* "that the custom there is, that wives shall have a "*moiety* for their dower, and shall hold it as long as they "live chaste and unmarried, *et non secundum cursum commu-* "*nis legis*, and that the demandant had taken another hus- "band," and prayed judgment if she should have her dower; to which the demandant demurred. And the Court adjudged, that the prescription in the bar was good, being in the negative; and Periam, Just. said, that if he had not pleaded in the negative, yet the demandant should not have dower, for the custom, that wives shall have the moiety, is the com-

* See a precedent of such a plea, Robinson's Ent. 245.

mon law in Kent, and no other law runs there. (*Hunt* v. *Gilburne*, Cro. Eliz. 121; S. C. Goulds. 108; 1 Leon. 133; Moor, 260; Sav. 91.) CHAP. II.

Indeed, the strength of this case is much taken off by its being on demurrer, which confessed the custom in the negative and exclusive manner in which it was pleaded.

But it was afterwards, upon evidence on a trial at bar on this issue, whether it was the custom of gavelkind, that if the husband alienéd his land, the wife might demand a third part for her dower, or a moiety at her election, resolved (the demandant not being able to produce any precedents, or proofs, that there was any other dower of gavelkind lands in Kent than dower by the custom), that the custom precisely is, that she shall have a moiety *; and as it is for the benefit of the heir, that she should have the moiety, she being thereby under the restraint to hold it only while she lives sole and chaste, she is bound by the custom, and cannot wave it. (*Davies* v. *Selby*, Cro. Eliz. 825; cited Moor, 260.)

And in Co. Litt. 33 b, it is said, "By the cus-"tom of gavelkind, the wife shall be endowed "of a moiety as long as she keeps herself sole "and without child, which she cannot wave and "take her thirds for life, for in that case *consue-*"*tudo tollit communem legem.*"

By the statute of *Merton* (20 Hen. 3, c. 2), Of devising

* This is likewise said to have been the opinion of Lord Dyer. (1 Leon. 61.)

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the crop on lands held in customary dower.

all widows may devise the crop growing on the lands, which they hold in dower; which words, *all widows*, being general, comprehend dower by the custom, as well as other dower. (2 Inst. 81.) *(g)*

(g) The present Dower Act (3 & 4 Will. 4, c. 105), also includes by implication within its operation, freehold lands of a customary tenure. But it does not extend to copyholds. (*Powdrell* v. *Jones*, 2 Sm. & Gif. 407; *Smith* v. *Adams*, 2 Eq. Rep. 1001.)

CHAP. III.

OF THE CUSTOMARY WARDSHIP, AND OF ALIENATION BY AN INFANT TENANT IN GAVELKIND.

BY the old common law, guardianship in socage continued a year longer than it does at present, as we see by the 70th law of Hen. I, sec. 18:

"Si quis pater mortuus fuerit, et filium vel filiam hæreditandam reliquerit, usque ad xv. ætatis annos, nec causam prosequantur, nec judicium subeant, sed sub tutoribus et actoribus sint in parentum legitimâ tutelâ," &c.

And Bracton, speaking of wardships (fol. 86 b), says: "Si fuerit hæres sockmanni, tunc demum cum xv. annos compleverit ætatem habere intelligitur." So likewise, Glanv. lib. 7, cap. 9. And this is still the age by the custom of Kent; for if a tenant in gavelkind die, [without having exercised his power of appointing a guardian according to the statute, 12 Car. 2, c. 24,] leaving his heir or heirs within the age of fifteen, the next of blood to whom the inheritance cannot descend, shall (by the appointment of the lord, if there be several in equal degree of kindred) have the custody of the body, lands, and goods of such

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infant heir, until he attain to that age; even as the guardian in socage at common law shall, till the ward is fourteen years old. But the lord shall take nothing for the appointment, nor ought he to tender any marriage to the heir. And when the heir arrives at the age of fifteen, this customary guardian shall deliver up his goods and lands to him, with the improvements, and in all things shall be charged, and have allowance as guardian in socage at common law. (Consuetud. Kanc., post; Lamb. 611, 624.) *(h)*

Of alienation by an infant of fifteen.

Though the custom puts some confinement on the heir, by keeping him in ward one year longer than is permitted by the course of the common law, yet it makes ample amends to him, by a favour allowed him afterwards, which is, to alien his lands, as soon as by attaining the age of fifteen years, he is out of that custody. (Custumal

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(*h*) The occurrence of guardianship in socage is rendered unfrequent, because the infant must take the legal estate in the land (*Rex* v. *Toddington*, 1 B. & Ald. 560) by descent (*Quadring* v. *Downs*, 2 Mod. 177; Hargr. Co. Litt. 87 b, n. 1, 88 b, n. 13); and the father may by the stat. 12 Car. 2, c. 24, sec. 8, appoint, either by deed or will, who shall be guardians of his children after his death until they attain 21, or for any less period, which will prevent the appointment of a guardian in socage. (Hargr. Co. Litt. 88 b, n. 15; See generally 2 Byth. Convey. by Sweet, 561.)

The power of appointing a guardian by the lord is now never exercised, as it falls more within the province of a Court of Equity. (See Bacon's Abr. tit. "Guardians by custom.")

of Kent, post; Lambard's Peramb. 626/564, 626/565; Somn. 146; Itin. Kanc. 6 Edw. 2, rot. 69; Trin. T. 12 Edw. 1, C. B. rot. 68; Mich. T. 11 Edw. 3, B. R. rot. 133; Mich. T. 20 Rich. 2, B. R. rot. 62; *Alex. de Greenhethe's* case, Plac. Ass. in Com. Kanc. 15 Edw. 2; *Mich. Pour's* case, 12 Rich. 2; 9 Edw. 3, 38; 39 Edw. 3, 10 b; 29 Edw. 3, 5 a; 32 Ass. 4, 11 Hen. 4, 29 b; *Lowe* v. *Paramour*, Dyer, 301 b; Camd. Britan. 284; [*Hearle* v. *Greenbank*, 3 Atk. 711;] And the cases, post.)

Itin. Kanc. 55 Hen. 3, rot. 5, in dorso. "TOTUS COMITATUS* recordatur, quod *quilibet ætatis quindecim annorum tenens, vel tenere clamans* aliquam terram in gavelykynde, potest *dare vendere* terram suam, de quâ fuit in seisinâ, ac etiam *remittere* et quietum clamare totum *jus* et *clameum*, quod habet, vel habere possit in aliquo tenemento petendo; adeò licitè et liberè sicut quilibet alius ætatis viginti et unius anni de tenuris forinsecis, quæ tenentur per servitium militare."

This custom extends to a female heir in gavelkind of the age of fifteen, as well as a male; as appears by 11 Hen. 4, 33; Itin. Kanc. 55 Hen. 3, rot. 25; Ass. in Com. Kanc. 2 Rich. 2, post, 128; 4 Rich. 2, post, 131; 13 Rich. 2, post, 133. And is expressly so recorded *per totum comitatum**, in Itin. Kanc. 7 Edw. 1, rot. 47, Rex. roll.

But the later resolutions and practice have

* For the meaning of this expression, see note ante, p. 82.

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added the following proper and reasonable restrictions to this customary alienation:

The restrictions attending this custom.

1st. That it must be by feoffment. (Lamb. $\frac{6}{5}\frac{2}{6}\frac{7}{5}$, 566; 11 Hen. 4, 33; 21 Edw. 4, 24; Noy's Max. 40.) But see post, 120. *(i)*

And the livery of seisin must be *propriâ manu* of the infant, and not by letter of attorney (Lamb. $\frac{6}{5}\frac{2}{6}\frac{7}{5}$; Noy's Max. 40); for this custom to enable a person disabled by law, ought to be taken strictly, and therefore, shall not extend to feoffments by attorney, without a particular custom for that purpose; for an infant can do nothing to pass a thing out of him by attorney. (*Combes's* case, 9 Rep. 76 b.)

Whether the custom extends to other conveyances. See post, 120.

Nor does the custom extend to any other conveyance or assurance, for it shall be taken strictly. (Lamb. $\frac{6}{5}\frac{2}{6}\frac{7}{5}$; Noy's Max. 40.) Therefore, the custom does not enable him to make a will of these lands at 15. (Co. Copyh. sect. 33.) *(j)*

The custom does not extend to the grant of a reversion on an estate for life (11 Hen. 4, 33; Old Bendl. 33); for that lies not in livery.

See post, 120.

By the opinion of Hankford, Justice (11 Hen.

(i) The provision in the stat. 8 & 9 Vict. c. 106, which requires a feoffment to be evidenced by deed (sec. 3), does not extend to feoffments of gavelkind lands by infants, although a deed is invariably used in practice; the above section expressly excepting "feoffments made under a custom by an infant."

(j) The Wills Act (1 Vict. c. 26), enacts, "that no will made by *any* person under the age of twenty-one years shall be valid." (sec. 7.)

4, 33 a), the custom does not extend to a release of a right. And it is said generally in 5 Hen. 7 (31 a, 32 a, 41 a), that though there be a custom for an infant of fifteen to make a feoffment, yet his release is void; but it is not applied to the custom of this County.

Nor is a lease and release warranted by this custom of Kent. (*Obiter*, 21 Edw. 4, 24; Bro. Custom, 50.)

And as this custom is not of a kind to be favoured or extended, and a feoffment was the conveyance most used at common law, and being the most public and notorious method of alienation, is fittest in the case of an infant, where there may be suspicion of fraud or imposition; I believe no prudent person would advise to try the experiment of any other conveyance, where a feoffment may possibly be had *(k)*.

(k) It is almost superfluous to remark, that it is the invariable practice of conveyancers, to convey the shares of infant coheirs in gavelkind by feoffment, unless there are several coheirs interested, and only one of them an infant, and the purchase money small in amount; in which case, some gentlemen adopt the usual form of conveyance of common law lands, and insert a covenant by the other vendors, that the infant shall within a specified time [usually one month] after he shall attain his age of 21 years, execute the deed, and, in the meantime, they invest his share of the purchase money in the joint names of the infant and the purchaser. But it is not advisable to adopt this course, as the infant may die under age, or on attaining twenty-one, refuse to execute the deed; besides, the purchaser might in the interim be desirous of selling, and as one of the shares would be outstanding in the infant, it would probably depre-

Book II. But when I contend, that this customary power of alienation is confined to feoffments, I would be understood to consider the infant as in actual possession and seisin of the land; for otherwise (as I take it), the custom will warrant him at the age of fifteen, to release the fee to his guardian holding over, or to a tenant for life, or a mere right to one that has a defeasible estate, who have seizin already; and the modern notion to the contrary, may possibly appear on examination, to have no better foundation than the single opinion of justice Hankford, in 11 Hen. 4, 33, which, as it was disregarded in the very case, so it was grounded on a misrepresentation (as it seems) of the record of 55 Hen. 3, before cited, arising from a slip of the judge's memory. The year-book case is, in effect, no other than this:

Ante, p. 117.

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ciate the value of the shares already conveyed. (See the Report of the Real Prop. Comm., post.)

It has been suggested to the Editor, that since the passing of the stat. 8 & 9 Vict. c. 106, a feoffment is not *necessarily* the only mode of conveying land in gavelkind by infant heirs, because, by the 2nd section it is enacted, "that *all* corporeal tenements and hereditaments, shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in *grant* as well as in *livery*," thus giving equal validity to either mode of conveyance. But the Editor agrees with Mr. Sweet, who, in a note to the above section in his Supplement to the 9th vol. of Jarman's Convey. (p. 300), says, "Where lands of freehold tenure are subject to a custom requiring a special mode of alienation, the customary forms must still be observed." And Mr. Sandys is of the same opinion. (Consuetud. Kanciæ, 182.)

In a writ of entry *sur cui in vitâ*, as son and heir of *Margery*, who was daughter and heir of *Margery*, of whose possession, &c., the counsel for the tenant pleads in bar, that the lands are gavelkind; and that the mother of the demandant, through whom the descent was made, released to the tenant all her right with warranty, when she was of the age of fifteen; and offers to aver, that the usage is, that they may at that age alien by feoffment, and likewise *release their right.* But Hankford, Justice, says, you shall not take so large an averment, for the usage is of record in the time of King Henry 3 (to which the reporter adds a *quære* what record he meant; but I have already shewn how the custom is recorded in the time of that King), and shall be taken *ex stricto jure;* and the usage is, that he may make a feoffment, without other alienation. But if he makes a feoffment with warranty at such age, he shall not be bound by the warranty, for that the usage does not extend to that *(m)*; and if I am disseised, and I release, this is not my feoffment. Then here, when the right of the feme was discontinued, and an action descends to the heir, though the heir releases, this is not a feoffment, but an extinguishment of the right of action, and she could not extinguish her action while she was within age. But notwithstanding this, it is remarkable, that Norton, of counsel with the demandant

Ante, p. 117.

(l) See post, p. 133, and note *(m)*.

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(being possibly better instructed of the custom), durst not demur to the plea, though urged to it by Thurling, Ch. J., but passed over, and replied, that the release was made in the time of the grandmother, before any right accrued to the mother; and the counsel for the tenant being apprehensive of this, relied on the warranty, &c. *Et sic pendet, &c.*

This case, upon the whole, is rather an authority, that the custom warrants the infant to release a right; since it had otherwise been unnecessary to have pleaded, that her right accrued after such release. Indeed, the opinion of Hankford, Just., is partly followed by an *obiter* saying in 21 Edw. 4, 24; but neither in that, nor in any other of the printed cases, was the matter judicially before the Court. And if we have recourse for the decision of this question, to the voice of the County, who are the proper judges of the special customs of gavelkind, words cannot be more express to comprehend a *release*, than those of the whole County above, in 55 Hen. 3. To which may be added the following verdicts in the very point:

Ante, p. 117.

Peter de Merdale's case.

Itin. Kanc. 6 Edw. 2, rot. 17. The whole record whereof is inserted above, page 84. The demandant being seized of one moiety of the gavelkind inheritance of his late wife, as tenant by the curtesy, and of the other moiety, as guardian to his two sons *William* and *Roger*, the jury find, "quòd posteà prædicto *Will'o* filio *Petri*, ætatis quindecim "annorum existente, quando idem *Will'us* fuit *plenæ ætatis*, "*secundum consuetudinem de gavelykynde, scil. post quintum* "*decimum annum completum*, per quoddam scriptum con-

Verdict finding the release of infant at fifteen, by the custom of gavelkind.

"fectum apud *London.*, concessit et dimisit prædicto *Petro* "omnes terras et tenementa cum pertinentiis, quæ habuit, "sive habere potuit in villis prædictis, per successionem hæ- "reditariam de prædictâ *Agnete* matre ipsius *Will'i*, tenen- "dum eidem *Petro* ad terminum vitæ ipsius *Petri;* prædictis "tenementis, unde assisa ista arrainata est, *in seisinâ præ- "dicti* Petri *existentibus;* qui quidem *Will'us*, postea rediens "ad prædicta tenementa, factum suum prædictum patriæ "notificavit et ratum habuit," &c. And thereupon, judgment is given against *William* for his purparty, though *Peter's* title to one moiety as guardian, was then at an end; and as to the other, he had incurred a forfeiture by marriage.

De Gatewyk's case.

Mich. T. 9 Edw. 2, C. B. rot. 240, Kanc. A *nuper obiit* brought by *Richard* and *William de Gatewyk* against *Catherine de Gatewyk*, and others. The pleadings as to the purparty of *Richard*, are as follow:

Bar, that the demandant released all his right of parcenary.

"*Katharina* et aliæ, per *Adam de Byram* custodem "suum, veniunt et defendunt jus suum, quando, &c., et "quoad propartem quam prædictus *Ricardus* filius *Ricardi*, "clamat, &c., dicunt, quòd idem *Ricardus* nihil juris cla- "mare potest in prædictis tenementis, quia dicunt, quòd *præ- "dictis tenementis*, simul cum aliis tenementis in diversis "villis in eodem comitatu, *in seisinâ prædicti Johannis de "Gatewyk*, patris ipsarum *Katherinæ* et aliarum *existentibus*, "idem *Ricardus* per scriptum suum concessit, *remisit*, et "omnino pro se et hæredibus suis imperpetuum *quietum-cla- "mavit* prædicto *Johanni totum jus et clameum*, quod habuit, "vel aliquo modo habere potuit, ratione parcenariæ vel com- "munis successionis post decessum *Ricardi de Gatewyk*, "patris prædicti *Johannis*, in omnibus terris, tenementis, "messuagiis, redditibus, boscis, pratis, pasturis, molendinis, "vivariis, cum omnibus eorum pertinentiis, quæ quondam "fuerunt dicti *Ricardi de Gatewyk*, patris prædicti *Johannis*, "in *Ash*, *Hartley*, *Dartford*, *Otford*, *Sevenoaks*, *Kemsing*, "*Seal*, *Kingsdown*, et *Mapeleschaump*, habendum et tenen- "dum omnia prædicta tenementa, &c., prædicto *Johanni* et "hæredibus suis de capitalibus dominis feodi imperpetuum, "&c.; et proferunt scriptum illud quod hoc testatur, unde "petunt judicium, &c.

Demandant replies, that he was under age at the time of the release.

"Et prædictus *Ricardus*, quoad prædictum scriptum quietæ-clamantiæ, bene cognoscit scriptum illud esse factum "suum, sed dicit, quòd ipse prætextu scripti illius ab actione "præcludi non debet, quia dicit, quòd ipse tempore confectionis prædicti scripti fuit infrà ætatem; et hoc paratus "est verificare, &c.

Tenants rejoin the custom of Kent to be of full age at fifteen as to aliening gavelkind lands, and releasing his right; and that the demandant was fifteen when he released.

"Et *Katherina* et aliæ dicunt, quòd prædictus *Ricardus* "*secundum consuetudinem Kanciæ fuit plenæ ætatis* tempore "confectionis prædicti scripti; dicunt enim, quòd consuetudo in partibus illis talis est, quòd hæres de tenurâ de "gavelykynde, cùm complevit quintum decimum ætatis suæ "annum, est plenæ ætatis secundum consuetudinem illam ad "tenementa sua alienanda, et jus suum quietè-clamandum, "&c., et dicunt, quòd prædictus *Ricardus* tempore confectionis ejusdem scripti fuit quindecim annorum et amplius; "et hoc paratæ sunt verificare, &c.

The demandant takes issue on the custom.

"Et *Ricardus* dicit, quòd consuetudo quam prædicta "*Katherina* et aliæ allegant, non est talis in partibus præ"dictis; dicit enim, quòd ad hoc, quòd alienatio sive quietè"clamancia alicujus de tenementis, quæ sunt de tenurâ de "*gavelykynde*, ipsum præcludere debent, requiritur quòd "ipse tempore alienationis seu *quietè-clamanciæ* hujusmodi "sit ætatis viginti et unius annorum plenè completorum, et "non infrà ætatem illam, viz., statim post quintum decimum "annum completum, sicut prædicta *Katherina* et aliæ dicunt; "et hoc petit quòd inquiratur per patriam, &c. Et *Katherina* et aliæ similiter.

Verdict, that one of the age of fifteen, may give and *release* gavelkind lands, and that the demandant released at that age.

"Postea juratores de consensu partium electi, venerunt, "et dicunt super sacramentum suum, quòd prædictus *Ricardus*, tempore confectionis prædicti scripti *quietè-clamanciæ*, "quod prædictæ *Katherina*, *Marg.*, et *Eliz.*, proferunt sub "nomine ipsius *Ricardi*, fuit ætatis quindecim annorum et "amplius, et quòd *quilibet ætatis quindecim annorum de "tenurâ de gavelykynde, potest tenementa sua dare, et quietè"clamantiam imperpetuum inde facere, secundum consuetu"dinem tenuræ illius, &c.*

Judgment accordingly for the tenants.

"Ideò consideratum est, quòd prædictus *Ricardus*, quoad "propartem suam ipsum contingentem de tenementis præ"dictis, nil capiat per juratam istam, sed sit in mîa pro falso "clamore, &c."

Parlebien v. *Wisdom.*

Plac. * Ass. in Com. Kanc. 47 Edw. 3. "Assisa venit "recognitura si *Johannes Wisdom* et *Isabella* uxor ejus, in- "justè et sine judicio disseisiverunt *Simonem Parlebien* de "libero tenemento suo in *Kidbrooke* et *Eltham*, post primam, "&c. Et unde queritur de duodecim acris terræ, et dimidio "acræ prati cum pertinentiis, &c.

"Et *Johannes* et *Isabella* in propriis personis suis veni- "unt, et respondent ut tenentes tenementorum prædictorum, "et dicunt, quòd prædictus *Simon* assisam inde versus eos "habere non debet, quia dicunt, quòd idem *Simon* per quod- "dam scriptum suum, quod proferunt hîc in Curiâ, cujus "data est die lunæ prox. post festum purificationis Beatæ "Mariæ anno regni Regis nunc Angliæ 35°, *remisit et quie-* "*tum clamavit* eidem *Johanni Wisdom*, totum jus suum "quod habuit in tenementis prædictis; et petunt judicium, "si idem *Simon* assisam inde versus eos contra scriptum "suum prædictum, habere debeat, &c.

The tenants plead the release of the plaintiff;

"Et prædictus *Simon*, non cognoscendo scriptum prædic- "tum, dicit, quòd ipse ab assisâ in hâc parte habendâ excludi "non debet, quia dicit, quòd ipse tempore confectionis scripti "prædicti fuit infrà ætatem, &c., et hoc petit quòd inquira- "tur per assisam, &c.

who replies, that he was under age at the time.

"Et prædicti *Johannes* et *Isabella* dicunt, quòd tenementa "prædicta sunt *gavelkyndensia*, et dicunt, quòd *usus gavel-* "*kynd talis est, quòd quilibet homo ætatis quindecim anno-* "*rum, potest terras et tenementa sua dare et alienare, remit-* "*tere et relaxare cuicunq. voluerit, a toto tempore in Com.* "*Kanc. usitatus.* Et dicunt, quòd tempore confectionis "scripti prædicti dictus *Simon* fuit ætatis quindecim anno- "rum, ita quòd, tunc remittere et relaxare potuit jus suum "de tenementis prædictis in formâ prædictâ; et hoc parati "sunt verificare per assisam, &c.

Tenants rejoin, that the plaintiff was fifteen, and by the custom of gavelkind may release at that age.

"Et prædictus *Simon* dicit, quòd ipse, tempore confec- "tionis scripti prædicti, non fuit ætatis quindecim annorum; "et hoc paratus est verificare per assisam, &c. Et prædicti "*Johannes* et *Isabella* similiter. Ideò capiatur inde inter eos "assisa, &c.

Plaintiff surrejoins, that he was under fifteen.

* N.B. The rolls of the records before the Justices of assize are seldom numbered, but the bundles are generally small.

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"Recognitores veniunt, qui ex consensu partium ad hoc "electi et jurati dicunt super sacramentum suum, quòd præ- "dictus *Simon* tempore confectionis scripti prædicti *fuit* "*ætatis quindecim annorum*, et amplius. Ideò consideratum "est, quòd prædictus *Simon* nihil capiat per assisam istam, "sed sit in mîa pro falso clamore suo, &c. Et prædicti "*Johannes* et *Isabella* inde sine die."

Verdict, that he was upwards of fifteen.

Judgment for the tenants.

Rich. de Bourne v. *J. de Hegham.*

Ass. in Com. Kanc. 7 Edw. 3, rot. 2. An assize brought before former justices of assize, by *Richard de Bourne* and *Joan* his wife, against *John*, son of *Thomas de Hegham*, and others, for a large quantity of lands in *Littlebourne*, *Stodmarsh*, *Chislet*, *Reculver*, and *Minster*, in the isle of *Thanet*.

Bar, that the tenant's father died seized, and his mother was afterwards seized of the lands as guardian in gavelkind, and the tenant entered on her at fifteen.

John de Hegham pleads, "quòd tenementa sunt de tenurâ "de *gavelkynde;* et dicit, quòd prædictus *Thomas* pater suus, "obiit seisitus de eisdem tenementis in dominico suo, ut de "feodo et jure; post cujus mortem, prædicta *Johanna*, quæ "nunc queritur simul, &c., ut ipsa, quæ fuit uxor prædicti "*Thomæ*, post mortem ipsius *Thomæ*, seisivit prædicta tene- "menta *secundum usum de gavelkynde*, *ratione nutrituræ* "ipsius *Johannis* filii et hæredis ipsius *Thomæ*, et ea op- "tinuit per usagium prædictum, usq. ad ætatem prædicti "*Johannis* filii *Thomæ*, *quindecim annorum;* post quod tem- "pus, idem *Johannes* filius *Thomæ*, ut ipse qui *plenæ ætatis* "fuit per usagium prædictum, intravit prædicta tenementa "ut hæreditatem suam, et sic tenet ipse tenementa illa; et "petit judicium, si prædicti *Ricardus* et *Johanna* de hu- "jusmodi possessione prædictæ *Johannæ*, ratione nutrituræ "prædictæ, ut prædicitur, assisam, &c.

Plaintiffs reply a release by the tenant at fifteen to his mother, the lands being gavelkind.

"Et prædicti *Ricardus* et *Johanna* non dedicunt quin "eadem *Johanna* habuit nutrituram prædicti *Johannis* filii "*Thomæ*, seu quin tenuit prædicta tenementa ratione nutri- "turæ per usagium, sicut prædictum est, sed dicunt, quòd "ipsi eâ de causâ ab assisâ suâ repelli non debent; dicunt "enim, quòd *prædictis tenementis in* * *seisinâ ejusdem* Johan-

* If a guardian, after the full age of the heir, continues in posses-

"næ *existentibus*, *prædictus* Johannes *filius* Thomæ, *post* "*ætatem suam quindecim annorum, ut ille qui plenæ ætatis* "*fuit secundum usum de gavelkynde, remisit, dimisit, et re-*" *laxavit eidem* Johannæ *totum jus et clameum suum*, quod "habuit in eisdem tenementis ; et proferunt inde quoddam "scriptum hîc in Curiâ sub nomine prædicti *Johannis* filii "*Thomæ*, quod idem testatur in hæc verba: Universis "scriptum hoc visuris, vel audituris, *Johannes* filius *Thomæ* "*de Hegham*, salutem in domino sempiternam. Noveritis "me *in purâ et legitimâ ætate* dimisisse, concessisse, et im-"perpetuum quietum-clamâsse, pro me et hæredibus meis, "*Johannæ de Hegham* matri meæ, et hæredibus suis, totum "jus meum et clameum quod habui, vel aliquo modo habere "potero in futuro, in omnibus et singulis tenementis meis "ubicunq. in Com. Kanc. existentibus, &c.

"Et prædictus *Johannes* filius *Thomæ*, non dedicit præ-"dictum esse factum suum, sed dicit, quòd scriptum illud ei "nocere non debet, dicit enim, quòd tempore confectionis "scripti illius *fuit infrà ætatem quindecim* annorum ; et de "hoc se ponit super patriam, et prædicti *Ricardus* et *Jo-*"*hanna* similiter, &c ;" which plea is an admission of the custom. And this record being sent down to the present justices of assize, "coram præfatis justiciariis, prædicti "*Ricardus* et *Johanna* uxor ejus veniunt, et prædictus "*Johannes* filius *Thomæ*, non venit ad manutenendum pla-"citum, quòd aliàs placitavit, &c., sed *Will'us de Waure* "respondet pro eo, quàm pro aliis, tanquam eorum ballivus, "et dicit, quòd nullam injuriam inde fecerunt seu disseisinam, "et de hoc se ponunt super assisam, &c." And the jury find for the plaintiffs ; which, it seems, they could not have done, had not the right passed from the tenant to the plaintiff (*Joan*) by this release ; for otherwise, the tenant's entry had been lawful and no disseizin. And on that verdict there is judgment for the plaintiffs.

The tenant rejoins, that he was under fifteen at the time of the release.

And afterwards repleads *Null disseisin*, &c.

Verdict,

and judgment for the plaintiffs.

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sion against the will of the heir, the law looks upon him as an abator (Co. Litt. 57 b), if with the consent of the heir, he is tenant at will. In either case he is capable of accepting a release ; in the first, because he has a freehold ; in the second, by reason of the privity.

Spicer v. Marchall.

Ass. in Com. Banc. 2 Rich. 2. "Assisa venit recognitura "si *Johannes Marchall* de *Rouchestre*, et *Johanna* uxor ejus, "injustè, &c., disseisiverunt *Alianoram Spicer* de *Rou-* "*chestre*, de libero tenemento suo in *Rouchestre*, post pri- "mam, &c. Et unde queritur, quòd disseisiverunt eam de "duobus messuagiis cum pertinentiis, &c.

The tenants plead in bar, a release by the plaintiff at her age of fifteen, the tenements being gavelkind.

"Et prædicti *Johannes* et *Johanna* in propriis personis "suis veniunt, et respondent ut tenentes tenementorum in "visu positorum, et dicunt, quòd assisa inde inter eos fieri "non debet, quia dicunt, quòd *tenementis prædictis quæ sunt* "*de tenurâ de gavelkynd, in seisinâ ipsius* Johannæ, dum "sola fuit existentibus, præfata *Alianora plenæ ætatis existens* "*secundum consuetudinem de gavelkynd, viz., de ætate quinde-* "*cim annorum et amplius, per quoddam scriptum suum* quod "hîc in Curiâ proferunt, cujus data est apud *Rouchestre*, &c., "per nomen *Alianoræ*, filiæ *Roberti Spicer* de Rouchestre, "*remisit, relaxavit, et omnino de se et hæredibus suis imper-* "*petuum quietum-clamavit eidem Johannæ* per nomen *Jo-* "*hannæ*, quæ fuit uxor *Roberti Spicer* patris ipsius *Alianoræ*, "*et hæredibus suis, totum jus et clameum quæ habuit in mes-* "*suagiis prædictis*, per nomina duorum messuagiorum situato- "rum in civitate *Rossensi*, unde unum messuagium, vocatum "*Swan atte Hope*, situatur inter messuagium *Johannis de* "*Barton* versus *East*, et messuagium *Benedicti Ryx* ver- "sus *West;* et aliud messuagium situm est inter messua- "gium quondam *Emmæ Godwyne* versus *East*, et messua- "gium *Roberti Bridbrook* versus *West*, et prædictum mes- "suagium vocatur *Cheker atte Hope;* et ulterius *obligavit* "*se, et hæredes suos, ad warrantizandum* eidem *Johannæ*, "hæredibus et assignatis suis, messuagia prædicta cum per- "tinentiis, imperpetuum; unde petunt judicium, si eadem "*Alianora* contrà scriptum suum prædictum, et quod *war-* "*rantiam* in se continet, assisam de tenementis prædictis "versus eos habere seu manutenere debeat, &c.

Plaintiff replies, that the release was made through duress of imprisonment, &c.

"Et prædicta *Alianora* dicit, quòd ipsa virtute scripti "prædicti, seu *warrantiæ* in eadem contentæ, ab assisâ de "tenementis prædictis habendâ præcludi non debet, quia "dicit, quòd tempore confectionis scripti illius, ipsa fuit im- "prisonatà in quâdam camerâ in villâ prædictâ per prædictam

"*Johannam*, et in eâdem detentâ, et ulterius eadem *Johanna* "ipsi *Alianoræ* comminata fuit, quod non comederet, nec "biberet, nec exiret abinde, donec eidem *Johannæ* concedere "vellet ad faciendum et sigillandum scriptum prædictum; "et sic dicit, quòd ipsa per hujusmodi duritiam, imprisona- "mentum, metum minarum prædictarum, ac cohercionem, "fecit eidem *Johannæ* scriptum prædictum; et hoc parata "est verificare, unde petit judicium, &c.

Issue joined on the duress.

"Et prædicti *Johannes* et *Johanna* dicunt, quòd tempore "confectionis scripti prædicti, præfata *Alianora* fuit sui juris "ad largum, et extra quamlibet prisonam, et scriptum illud "ex merâ et spontaneâ voluntate suâ fecit, et non per duri- "tiam imprisonamenti, metum minarum, aut per coher- "cionem; et de hoc se ponunt super assisam, et prædicta "*Alianora* similiter. Ideò capiatur inde assisa.

Verdict, that she was at large, &c.

"Recognitores veniunt, qui de consensu prædictorum "*Alianoræ*, *Johannis*, et *Johannæ* ad hoc electi, triati, et "jurati, dicunt super sacramentum suum, quòd tempore con- "fectionis scripti prædicti præfata *Alianora* fuit sui juris ad "largum, et extra quamlibet prisonam, et scriptum illud ex "merâ et spontaneâ voluntate suâ fecit, prout prædicti *Jo- "hannes* et *Johanna* placitando allegaverunt, et non per "duritiam imprisonamenti, metum minarum, seu per coher- "cionem, prout prædicta *Alianora* asseruit. Ideò conside- "ratum est, quòd eadem *Alianora* nihil capiat per assisam "istam, sed sit in mîa pro falso clamore suo, et prædicti "*Johannes* et *Johanna* eant inde sine die, &c.

Judgment for the tenants.

Henry Aleyn v. *Wm. de Echyng- hamme.*

Ass. in Com. Kanc. 4 Rich. 2, in iisd. rot. An assize brought by *Henry Aleyn* and *Agnes* his wife, against *William de Echynghamme*, Knight, and others, for lands in *Cranbrook*. On *nul disseisin* pleaded, the jury find specially (among other things) that, "prædictis *Henrico* et "*Agnete* in seisinâ medietatis messuagii et terræ existenti- "bus, &c. Quidam *Galfridus Nettere* filius *Galfridi Net- "tere*, per quoddam scriptum suum, iisdem recognitoribus in "evidentiam liberatum (quod sequitur in hæc verba: No- "verint universi per præsentes me *Galfridum Nettere* "filium *Galfridi Nettere*, de parochiâ de *Cranbrook*, conces-

Verdict finding the release of the heir in gavelkind.

Book II.

"*sisse*, *relaxasse*, et imperpetuum pro me et hæredibus meis "quietum-clamâsse *Henrico Aleyn*, et *Agneti* uxori ejus, de "eâdem parochiâ, totum *jus et clameum* quod habeo, seu "de cætero habere potero, in medietate cujusdam messuagii "cum suis pertinentiis, unà cum medietate de duabus peciis "terræ cum suis pertinentiis; quam quidem medietatem "prædicti messuagii, unà cum medietate dictarum peciarum "terræ, prædicta *Agnes* habuit ex dono prædicti *Galfridi* "patris mei, et dictum messuagium cum pertinentiis situa- "tum est, &c.) *concessit* et * [*remisit*] imperpetuum præfato "*Henrico*, et *Agneti*, et eorum hæredibus et assignatis, "*totum jus et clameum quæ habuit in prædictâ medietate* * "[*messuagii*], *et terræ prædictorum*, *&c.*, in *seisinâ eorundem* "Henrici *et* Agnetis *adtunc existente.* Recognitores quæ- "siti si terra prædicta sit de tenurâ de gavelkynde, necne, "et cujus ætatis præfatus *Galfridus* filius *Galfridi* exstitit "tempore confectionis scripti prædicti, præfatis *Henrico* et "*Agneti* facti, &c., *dicunt* super sacramentum suum, *quòd* "*prædicta* * [terra est de] *tenurâ de gavelkynde*, *et quòd* "*tempore confectionis scripti prædicti*, *præfatus* Galfridus "*filius* Galfridi *fuit circiter ætatem decem et septem anno-* "*rum*, *&c.*" And judgment is given for the plaintiffs *Henry* and *Agnes* for that moiety.

When about seventeen.

Judgment against the heir.

J. de Twytham v. *J. Feversham.*

Ass. in Com. Kanc. 4 Rich. 2. An assize of *novel disseisin*, brought by *John de Twytham* and *Maud* his wife, against *John Feversham* and *Sarah* his wife, for lands in *Nonington*, &c.

Release of an infant at fifteen of gavelkind lands pleaded.

The tenants, as to part of the premises, plead, that "*Ricardus Kempe* de *Brabourne*, &c., dedit *Johanni Akholt* "et *Saræ*, tenendum eis et hæredibus prædicti *Johannis* "*Akholt* imperpetuum; et de ipsis *Johanne Akholt* et *Sarâ* "exivit quidam *Edwardus Akholt*, ut filius et hæres eorun- "dem, et posteà prædictus *Johannes Akholt* obiit, post cujus "mortem *tenementis prædictis in seisinâ præfatæ* Saræ *exis-* "*tentibus*, *præfatus* Edwardus *filius et hæres ejusdem* Jo- "hannis Akholt, *de ætate quindecim annorum et amplius*,

* The roll is obliterated in these places.

"*per quoddam scriptum suum*, quod hîc in Curiâ proferunt, "*remisit et relaxavit eidem* Saræ, *et hæredibus ac assignatis* "*suis imperpetuum, totum jus et clameum* quæ habuit in "omnibus tenementis prædictis ; quæ quidem tenementa sunt "de tenurâ de *gavelkynde*, quæ quidem *Sara* cepit in vi- "rum ipsum *Johannem Feversham*, &c." And neither the release, nor the custom, are denied by the plaintiffs.

Croke v. *Bolle.*

Ass. in Com. Kanc. 4 Rich. 2. An assize brought by *John Croke* and *Dionise* his wife, against *John Bolle* and *Alice* his wife, for lands in *Seasalter*.

The tenants plead, that *Nicholas de Clyndene* father of the plaintiff *Dionise*, being seized in fee, devised them, according to the custom of the borough, to his wife *Alice* for life, who afterwards married *Bole;* "et posteà *tene-* "*mentis illis sic in seisinâ eorundem Johannis Bolle et* "*Aliciæ existentibus, præfata Dionisia de ætate quindecim* "*annorum* et amplius existens, per nomen *Dionisiæ*, &c., per "quandam cartam suam, quam hîc in Curiâ proferunt, &c., "*concessit et confirmavit* eidem *Johanni Bolle* et *Aliciæ* "uxori, et eorum hæredibus ac assignatis, omnia prædicta "tenementa cum pertinentiis imperpetuum, per nomen, &c., "quæ omnia tenementa sunt de tenurâ de *gavelkynde;* et "ulterius obligavit se et hæredes suos ad *warrantiam*, &c." and therefore pray judgment *si contra scriptum suum, &c.*

Plea of release and confirmation by the plaintiff at fifteen, by the custom of gavelkind.

The plaintiffs reply, "quòd ipsa *Dionisia* est infrà ætatem, "per quod ipsi cartam illam cognoscere vel dedicere, vel ad "illam respondere non possunt, nec per legem terræ com- "pelli debeant, et petunt assisam : et pro eò quòd eadem "*Dionisia* infrà ætatem est, the assize is awarded to be "taken at large ; et præceptum est vic. quod venire faciat "coram præfatis justiciariis *Thomam Spriget*, &c., testes "in prædictâ cartâ nominatos, ad recognoscendum simul, "&c."—Which shews, that the Court looked upon the execution of the deed to be the matter in dispute.

T. de Wormesell v. *John Kelsham.*

Ass. in Com. Kanc. 12 Rich. 2. An assize of *novel disseisin*, by *Thomas de Wormesell*, *Robert Brockman*, and others, against *John Kelsham*, for lands in *Newington*, near *Sittingbourne*.

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Plea of the custom of gavelkind to alien and release, &c.,

and of a release of the lands when above fifteen, to one having before a defeasible estate under the feoffment of an infant under fifteen.

The tenant pleads in bar, that the tenements "sunt de "tenurâ de gavelkynde; et dicit, quòd habetur ibidem talis "consuetudo, quòd quilibet tenens aliquorum tenementorum, "quæ sunt de tenurâ de gavelkynde, tenementa illa cùm "fuerit ætatis quindecim annorum, dare possit et alienare, *et* "*totum jus suum remittere et relaxare* ad voluntatem suam, "juxta consuetudinem comitatûs prædicti"; and that one *Thomas de Wornedale* being seized in fee of the premises, *et infrà ætatem quindecim annorum*, made a feoffment in fee thereof to one *Adam Elys*, and afterwards died, leaving one *Maud* his sister and heir (under whom the plaintiffs claim), who being "*ætatis quindecim annorum* et amplius, viz., "ætatis decem et septem annorum, per nomen *Matildæ* filiæ "*Ricardi de Wornedale*, per quoddam scriptum suum "quod hîc in Curiâ profert, cujus data est, &c. *remisit et re-* "*laxavit*, et omnino de se et hæredibus suis imperpetuum "quietum-clamavit præfato *Adæ* et ipsi *Johanni Kelsham*, "totum *jus suum et clameum* quæ habuit, vel aliquo modo "habere potuit, in tenementis prædictis cum pertinentiis, &c., "prædicto *Johanne Kelsham in possessione prædictorum* "*tenementorum adtunc existente, &c.*"

Reply *non est factum.*

The plaintiffs reply, that the release *non est factum prædictæ Matildæ*: which puts in issue neither the custom, nor the infancy, but the execution of the deed only. And upon this, issue was joined, &c.

Hamon v. *Wardon.*

Ass. in Com. Kanc. 13 Rich. 2. An assize brought by *Peter Hamon* and *Isabel* his wife, against *John Wardon* the elder, for lands in *Egerton*, &c.

Plea of custom of gavelkind for women at fifteen to alien, &c.

The tenant pleads in bar, "quòd tenementa in visu posita "tenentur secundum consuetudinem de *gavelkynd;* et dicit, "quòd per consuetudinem de *gavelkynd*, mulieres quæ sunt "inde tenentes, cùm ætatis quindecim annorum fuerint, "tenementa illa alienare possunt; et dicit, quòd prædicta "*Isabella*, per nomen *Isabellæ Brestcombe*, dum sola fuit, et "*ætatis quindecim annorum* et amplius, per quoddam scrip- "tum suum quod hîc in Curiâ profert, &c., cujus data est, "&c., *remisit et relaxavit*, et omnino de se et hæredibus suis "imperpetuum quietum-clamavit eidem *Johanni Wardon*

Release by one of that age.

"seniori, per nomen *Johannis Wargedon*, et *Agneti* tunc "uxori ejus, *adtunc tenentibus tenementorum* prædictorum, "et hæredibus ipsius *Johannis Wardon* senioris, *totum jus* "*et clameum* quod habuit, seu quovismodo habere potuit in "tenementis prædictis, per nomen omnium terrarum et tene- "mentorum quæ quondam fuerunt *Rogeri de Brestcombe* "patris sui; et obligavit se et hæredes suos ad *warrantiam*, "*&c.*, unde petit judicium, &c." The plaintiffs reply, *non est factum*, and at the day of trial are nonsuited.

Whether a warranty on a customary feoffment be good.

A warranty on a feoffment within the custom is said to be void, the custom not extending to it. (11 Hen. 4, 33; [1 Roll. Abr. 568, H. pl. 5.]) But see before, 121, 131, and suprà (*m*).

Whether the alienation be confined to a sale.

2ndly. It is said in some of the books, that the custom warrants no alienation, but upon a sale (21 Edw. 4, 24; Old Bendl. 7; New Bendl. 33, by Hales, Serjeant), for a full and sufficient recompense. (Lamb. Peramb. $\frac{626}{564}$, $\frac{627}{565}$, 566; Noy's Max. 40.) For the words of the Custumal are *doner et vender* (Lamb. ibid); and those of 55 Hen. 3, rot. 5 (ante, 117), are *dare*, *vendere*. But the other two copies of the Custumal read *doner ou vender* in the disjunctive; nor can I find any instance on record, wherein the consideration for

(*m*) By recent statutes the effect of warranties may be considered as entirely taken away. The 3 & 4 Will. 4, c. 27, enacts, that no warranty shall defeat any right of entry or action for the recovery of land. (sec. 39.) And the 3 & 4 Will. 4, c. 74, enacts, that all warranties of lands made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination, or in defeazance of the estate tail. (sec. 14.)

Book II.

the feoffment is set out, as probably it would be, were it necessary; but the common way of pleading is, *quod dedit et concessit, &c.*, or sometimes, *quod feoffavit, &c.*, or *dimisit*, or *remisit et relaxavit*, as in the instances before *(n)*.

Whether to lands coming by descent.

3rdly. Some have said, that the infant must have the lands by descent, and not by purchase, for the words of the Custumal, *ceux heirs*, do not include purchasers. (Lamb. Peramb. $\frac{627}{565}$, 566; O. Bendl. 7; N. Bendl. 33, by Hales, Serjeant, who was a Kentish man.) So is the language

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(n) Agreeably with the authorities above cited, it is said by Mr. Coventry in his edition of Powell on Mortgages (vol. 1, p. 265, 6th edit. note G), to have been the opinion of a very eminent conveyancer (after referring to the doubt by Robinson), that a gavelkind tenant by descent could not mortgage until twenty-one, or dispose of his lands while under that age, for any other purpose than on an absolute sale for valuable consideration. And Mr. Coventry adds, "Customs in derogation of the common law are to be construed strictly; thence it should follow, that a conditional sale could not be made where the custom only authorizes an absolute one." This opinion has been generally coincided with by the profession. (See Sandys Consuet. Kanciæ, p. 169.)

It is said, however, that a sale by a woman of the age of 15, *causâ matrimonii prælocuti*, is a good conveyance; for marriage was reckoned to be a good and sufficient consideration. (Bacon's Abr. tit. "Gavelkind.") But whether a Court of Equity would consider that the custom enabled her after such marriage, while under age, to declare by feoffment the trusts contained in the settlement, so as to enable her trustees on a sale by them in pursuance of her appointment, to compel a specific performance of a contract by the purchaser, is a question not free from doubt.

of Mich. T. 11 Edw. 3, B. R. rot. 133, and Mich. T. 20 Rich. 2, B. R. rot. 62, that *hæredes de gavelykynde possunt alienare, &c.* For this reason, it is said, that the custom extends not to empower him to alien lands given him by will. (Noy's Max. 40.) But the conclusion is somewhat too hastily drawn; for the words of other records are more general, as that *quilibet tenens, &c.*, as in 55 Hen. 3, Itin. Kanc. rot. 5, ante, 117; Mich. T. 9 Edw. 2, C. B. rot. 240, ante, 123; Ass. in Com. Kanc. 47 Edw. 3, ante, 125; and Ass. in Com. Kanc. 12 Rich. 2, ante, 131. And likewise, among the same records of the same year (12 Rich. 2) in *Mich. Pour's* case, it is pleaded, "quòd habetur talis consuetudo in comitatu præ- "dicto, quòd*quilibet tenens* terrarum et tenemento- "rum quæ sunt de tenurâ de *gavelkynd*, tenementa "illa cùm ætatis *quindecim annorum* fuerit in feodo "alienare potest;" and a feoffment accordingly. And in Trin. T. 12 Edw. 1, C. B. rot. 68, Kanc., in a *dum fuit infrà ætatem*, and issue joined, whether the plaintiff were of full age, the jury find, *quòd fuit quindecim annorum quando dimisit, &c. Requisiti quantæ ætatis* homo *debet esse qui tenet in gavelikende, qui possit alium feoffare, per quòd stabile sit feoffamentum suum, dicunt, quòd quindecim annorum (o).*

(o) This point does not appear to have been ever judicially decided, but, notwithstanding the general expressions used in the records above cited, it is said, that the sale must be of lands coming to the infant by *descent*, and not by

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Whether to lands of which the infant is seized in fee.

4thly. He must be seized in fee. An infant above the age of fifteen years, made a feoffment of lands in gavelkind whereof he was tenant in tail; the Court held clearly, that this feoffment was no discontinuance, nor shall bind the infant,

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purchase, because, the infant's purchase could not be a subject matter for the custom; for, the Conqueror must be presumed to confirm nothing but a privilege that is immemorial. (Bacon's Abr. tit. "Gavelkind"; see also Powell on Mortgages by Coventry, vol. 1, p. 265, 6th ed. note G.) And such is the opinion of many conveyancers. Mr. Wilson in his edition of this work (p. 279) considers the point at least doubtful, but inclines to the opinion, that the privilege is confined to infants taking by descent, and cites the *Custumal* in support of it. On the contrary, Mr. Sandys (Consuet. Kanciæ, p. 165) states, that "neither in practice at this day, nor according to a succession of ancient records (referring to those above mentioned), has the custom received so limited and restricted a construction"; and with reference to the *Custumal*, observes, that the doubt expressed by Mr. Wilson would have greater weight, if our Kentish customs owed their creation, origin, and existence to it; "but as the *Custumal* is merely the record and allowance of customs which have existed from the Saxon period of our history, we may safely look to the ancient decisions of the justices in eyre, and to the modern usage, as authoritative exponents of it." (p. 168.)

If this custom were held to be confined to land acquired by descent, the Inheritance Act (3 & 4 Will. 4, c. 106), would, it is presumed, affect this right to enfeoff where the ancestor had devised the land to his heir; for, by the 3rd section it is enacted, that where land shall be devised to the heir, or to the person who shall be the heir of the testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; thus conferring on him a new estate by purchase.

for the custom shall never enable him to do a *tort;* and therefore, shall be taken to extend only to land whereof he is seized in fee. (*Vaughan* v. *Holdes*, Cro. Jac. 80.) (*p*)

Whether a gift in tail, or for life by livery be within the custom.

It seems, that an infant may within the custom, make a lease for life, or gift in tail, by livery *propriâ manu;* for a custom to grant lands in fee-simple, *à fortiori* extends to granting them for a lesser estate. (Co. Copyh. sect. 33; Co. Litt. 52 b; *Stanton* v. *Barnes*, Cro. Eliz. 373.) Nay, if a custom be to grant in fee *et non aliter*, yet he may grant for life, or, to A. for life, remainder to B. in tail. (*Smartle* v. *Penhallow*, Salk. 189, per Holt, Ch. Just.)

(*p*) A feoffment by a tenant in tail of land in possession, formerly caused a discontinuance of the entail, which had the effect of taking away the right of entry of the issue, and also of the remainder-men and reversioners, and to put them to their actions to recover the estate; but the stat. 3 & 4 Will. 4, c. 27, enacts, that no discontinuance shall defeat any right of entry or action for the recovery of land. (sec. 39.) And the stat. 8 & 9 Vict. c. 106, enacts, that no feoffment shall in future have any tortious operation for any purpose whatever. (sec. 4.)

CHAP. IV.

THE FATHER TO THE BOUGH, AND THE SON TO THE PLOUGH.

Book II.

The origin of this custom. Spelm. of Feuds, 38.

Vide King Ethelred's charter in the preface to the 6th Report.

What the custom is.

THE hereditary lands among the Saxons (otherwise called *Bocland)* were not subject to any feodal service, and therefore, could not escheat to any feodal lord. And this was the general usage of England, till the Conqueror, introducing hereditary feuds, imposed therewith, among the rest of the feodal servitudes, this of escheats. But even then, as at this day, if a man fled for felony, and was outlawed, he being esteemed a common enemy, *caput lupinum*, one out of the King's protection, his lands were forfeited to the Crown. And our Kentish gavelkind retains these, as well as many other properties of the Saxon *allodium;* for, by the custom of Kent, if tenant in fee-simple of lands in gavelkind commit felony, and suffer judgment of death, he shall incur forfeiture of his goods, but his lands of that tenure shall not be forfeited, nor escheat to the King,*

* Customs which are by reason of the land, as Gavelkind and Borough-English, bind the King, but customs by reason of the person or the goods do not. (35 Hen. 6, 28 a ; Bro. Custom, 5.)

or other Lord of whom they are holden; but the heir, notwithstanding the offence of his ancestor, shall enter immediately, and enjoy the lands by descent after the same customs and services, by which they were before holden. (Consuetud. Kanc., post; Lamb. Peramb. $\frac{610}{551}$; 8 Edw. 2, Itin. Kanc. Fitz. Prescription, 50; 22 Edw. 3, Prescription, 40, ibid, pl. 60; Dyer, 310 b; 2 And. 152; Somn. 48, 53, 146; Bacon's Use of the Law, oct. edit. 139; 1 Sid. 137; 1 H. H. P. C. 360; 3 Bulst. 215; Dr. & Stud. 40.)

Which has given occasion to the proverbial expression,

> The father to the bough,
> And the son to the plough.

(Stat. 17 Edw. 2, de Prærog. Reg. c. 16.) Or, as it is somewhat differently expressed in the manuscript copy of the Consuetudines Kanc. in Lincoln's Inn Library:

> The fader to the bonde,
> And the son to the londe.

Nor shall the King have the year, day, and waste of lands in gavelkind holden of a common person, where the tenant is executed for felony. (Consuetud. Kanc., post; 8 Edw. 2, Itin. Kanc. Prescription, 50; 20 Hen. 6, 8 b; Stamf. de Prærog. 49 b, 50 a; Lamb. Peramb. $\frac{610}{557}$; 3 Bulst. 215.) Which seems to be but a consequence of the other custom, according to the general rule in Bracton, 130 a, 131 a: "*Non debet Rex de*

Book II.

"*jure habere annum et diem de aliquâ terrâ quæ "non possit esse escheata dominorum.*"

How it is confined.

But this custom holds only where the defendant submits to the judgment of the law, and not where he withdraws himself from the hands of justice, and will not abide a legal trial; for, if tenant in gavelkind, being indicted for felony, absent himself, and is outlawed after proclamation made for him in the county, his heir shall reap no benefit by the custom, but the lands shall escheat to the lord [of whom they are immediately holden]; and the King shall have year, day, and waste in them, if holden of another, in like manner as the common law directs, as to lands which are not subject to the custom of gavelkind. (Consuet. Kanc., post; Itin. Kanc. 55 Hen. 3, rot. 86; 7 Edw. 1, Itin. Kanc. rot. 31; 6 Edw. 2, Itin. Kanc. plac. coron. rot. 62; 8 Edw. 2, Itin. Kanc. Prescription, 50; 22 Edw. 3, Prescription, 40; Stath. Custom, pl. 2; Lamb. Peramb. $\frac{611}{551}$; Stamf. de Prærog. 40 b; 2 Roll's Rep. 368; 1 H. H. P. C. 360; Wright on Tenures, 210.) And so it was adjudged in Canc. 28 Eliz., between *Brocas* and *Savage*. (Cited in the margin of the last edition of Dyer, 310 b.) *(q)*

"In itinere *W. de Ralegh*, in Com. Kanc. Assisa mortis "antecessoris, &c. Si *Adelophus*, &c., ubi dicitur, quòd felo-

(q) The common law lands of a felon, do not now escheat to the lord of the fee (who in the case of freeholds is generally the King), except for the crime of treason, or murder. (54 Geo. 3, c. 145.)

"nia antecessoris non impedit seisinam hæredis, nec succes-
"sionem; sed hoc specialiter in Com. Kanc. de tenementis
"quæ tenentur in gavelkind, si ille qui feloniam fecerit,
"*judicium sustinuerit.*" (Bract. lib. 4, fol. 276 b.)

Whether a brother shall inherit the gavelkind lands of his brother executed for felony.

It is said *obiter* in *Chapman's* case (2 Roll's Rep. 368), that if a brother in gavelkind is attainted, the land shall escheat; though otherwise it is, if the father be attainted, for, *The father to the bough, and the son to the plough;* and the reason there given is, that the custom shall be taken strictly.

But this is a mistaken opinion. Mr. Lambard in his Peramb. $\frac{611}{551}$, though he admits that some have doubted whether the brother or uncle shall have advantage of this custom, is notwithstanding of opinion himself, that whoever the heir be, he shall enjoy this privilege under the custom, as well as the son; because, the words of the Custumal extend to the heir in general, and are not restrained to the son alone.

And it is a distinction unknown to most of the authorities, both ancient and modern, the words of which are general as to all heirs:

"Felonia antecessoris non impedit seisinam hæredis, nec
"successionem." (Bract. suprà.) "By the custom of Kent,
"if a man be hanged for felony, the lord shall not have the
"escheat." (8 Edw. 2, Prescription, 50.) "The land is not
"forfeitable nor escheatable for felony." (Bacon's Use of the Law, 139.) "If the ancestor be executed for felony, the
"land shall not escheat, but descend to the heir." (1 H. H. P. C. 360.)

Rot. claus. 8 Rich. 2, m. 2, Kanc. The King writes to the sheriff of Kent, to re-deliver the gavelkind lands of a man executed for felony, which he had seized. "Cùm se-

"cundum consuetudinem de gavelkind in hoc casu, nos ha- "bere non debemus annum, diem, neque vastum, nec capi- "tales domini inde escheatam ; sed *proximi hæredes* sic con- "victorum et suspensorum hæreditatem suam immediatè "consequuntur, felonià illâ non obstante." (Taylor's Hist. of Gavelk. 107.)

Dower of gavelkind lands notwithstanding the felony of the husband.

And by the same custom, the wife's dower of the moiety of gavelkind lands, was in no case forfeitable for the felony of the husband, but where the heir should lose his inheritance. (Consuet. Kanc., post; 8 Hen. 3, Prescription, 60; Lamb. Peramb. $\frac{618}{558}$; Noy's Max. 28; Bract. lib. 4, fol. 311.) *(r)*

This custom extends not to high treason.

This custom holds only in case of felony, and extends not to treason; for, if a man be any way attainted of this offence, his gavelkind lands are forfeited to the King, notwithstanding this usage. (Lamb. Peramb. $\frac{610}{551}$; Dav. 37; 1 H. H. P. C. 360; Wright's Tenures, 118.) *(s)*

(r) The stat. 1 Edw. 6, c. 12, enacts, that the wife of a person attainted, convicted, or outlawed for felony, shall not be deprived of her dower. (sec. 17.)

(s) A forfeiture of lands for high treason, does not take effect unless an attainder be had, which occurs only when judgment of death or outlawry is given. And therefore, if a traitor dies before judgment is pronounced, or is killed in open rebellion, or hanged by martial law, it works no forfeiture of his lands. (4 Bl. Com. 381, 387.)

Various readings in Tottel's edition, 1556.

Various readings in the M. S. of Lincoln's Inn.

THE

CUSTUMAL OF KENT.*

The title is *Consuetudines Kanciæ.*

The title is *Constitutiones Kanc.*

FROM MR. LAMBARD'S COPY, WITH HIS TRANSLATION.

THESE are the usages, and customes, *Ces sount les vsages,* [a]* *et les custumes,* the which the comunalty of Kent claim- *les ques le comunaute de Kent, clei-*

[a] *Et les custumes* omitted.

* *Et les custumes* omitted.

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* As I have subjoined this *Custumal* to my own work, it may possibly be expected, that I should say something concerning the nature and authority of it; especially as the latter has been attacked by Sir Henry Spelman, who, in his Treatise of Feuds, c. 14, says, that there are such differences between Tottel's and Lambard's copies, that both their authorities may be questioned. But what foundation there is for this assertion, is left to the judgment of the reader, on the view of those differences which are here noted in the margin.

I have not been negligent in my endeavours to find out, whether this *Custumal* be any-

Various readings in Tottel's edit.

eth to have in the tenements of gavelkind, and in the men of gavelkind, *alkendé, e en gentz de gauilekendeys,* al-

Various readings M. S. Linc. Inn.

* The words between the stars omitted.

* The words between the stars, and likewise the

---

where on record. Mr. Lambard's copy mentions, that the usages therein contained, were allowed in *Eyre* in the 21st year of Edw. 1.(*a*) It happens, that the records of that *iter* are perfectly preserved, and I have perused them all, viz., the Chief Justice's (Berewicke) roll, the Rex roll, the roll of the Pleas of the Crown, and the Quo Warranto roll, but there is no such record among them, nor among those of any other *iter ;* and the language of the *Custumal,* being different from that wherein the proceedings before those Justices were recorded (which were ever in latin), leaves us little reason to believe that it had its origin there.

(*a*) A.D. 1293.

Lord Coke gives it the high appellation of *Statutum de Consuetudinibus Kanciæ,* but, it seems, on no other foundation, than that it is sometimes to be met with in old collections of statutes, as are many other matters which were never enacted by authority of parliament, and is so printed by Tottel (*b*) ; for, I have examined the parliament rolls of the 21st year of Edw. 1 (of which date the *Custumal* appears to be by the conclusion), and those of the preceding and subsequent years, being much the same as are published by Ryley, under the name of *Placita Parliamentaria,* and it does not occur there.

(*b*) A.D. 1556.

I then hoped to have found it at the Tower,

Various readings in Tottel's edit.

lowed in Eire before John of Berwike
lowes en Eire *John de Berewike*

Various readings M. S. Linc. Inn.

following words *cesta-scauoir que toutes les cors de Kenteys*, are omitted, and the sentence begins *Soient frankz*, &c.

but on inquiry, was informed, that there was no such record in that office.

I have, notwithstanding, little reason to lament my search, since it first brought me to the knowledge of those records of the Kentish *iters*, which are inserted in this book, and going to almost every point of our customs, take away, in a great measure, the necessity of authenticating the *Custumal:* which I imagine rather to have been a private collection of such things as had been found *per totum comitatum* *, or were otherwise known to be the custom of Kent, than a record of a public nature; and the words of Mr. Lambard's copy, that these customs were allowed before the Justices in Eyre, in the 21st Edw. 1, seem to favour a conjecture, that they might be extracted by command of those judges from the records of their predecessors, for the information of their own and future times.

* Vide ante, p. 82 n.

However, thus much may be said for the present authority of the *Custumal*, whether authentic in its original or not, that it has received such a sanction from its antiquity, as to have been admitted in evidence to a jury, even from Mr. Lambard's copy. (*Launder* v. *Brooks*, Cro. Car. 562.) (*c*)

(*c*) Mr. Lambard says, that he had copied the *Custumal* from an ancient and fair written Roll, that was given to him by Mr. George Multon, his father-in-law, and which sometime belonged to Baron Hales of this County. (Peramb. p. 569, edit. 1596.)

Various readings in Tottel's edit.

and his companions, the justices in Eire in Kent, the 21 yeere of King E., the sonne of King Henrie.* That is to say, that all the bodies of Kentish men be free, as well as the other free bodies of Englande. [b]* And that they ought not the eschetor of the King to chuse, nor ever in any time did they; but the King shall take, or cause to be taken, such an one as it shall please him, to serve him in that which shall be needful. And that they may their landes and their tenements give and sell, without licence asked of their

e ses compagnions, justices en Eire en Kent, le 21 an le Roy Ed., fitz le Roy Henrie. Cestascauoir, que toutes [a] les cors de Kenteys seyent francz, auxi come les autres fraunz cors de Dengleterre. Et que ilz ne duient le eschetour le Roy elire, ne vnkes en nul temps ne fesoint; mes le Roy prengne, ou face prendre, tiel come luy plerra, de ceo qui soit mistier a luy seruir. Et quilz pusent lour terres et lour tenementz [c]† doner et vender, saunz conge demaunder a lour*

Various readings M. S. Linc. Inn.

[a] *Les corps gavelkindes.*

[b] The whole passage concerning the escheator omitted.

* The whole passage concerning the escheator omitted.

[c] Doner *ou* vender.

† Doner *ou* vender.

Various readings in Tottel's edit.

lordes; saving unto the lordes, the *seignerages; sauues a seignorages, les* rents and the services due out of the *rentz e les sernices dues des* same tenements. And that all and *mesmes le tenementz. Et que touz e* every of them may by writ of the King, *chescun puseit per bre' le Roy,* or by plaint, plede for the obtaining [a] A son droit. *ou per pleynt, pleder pur* [a] * *lour droit* of their right, as wel of their [b] Desouth. *purchaser, auxibien* [b] † *de lour* lordes as of other men. And they *seignerages come des autres gentz. Et* claime also, that the communaltie of [c] Auxibien de la commonaunce de la gavelkinde. *clament* [c] *auxi, que la commune de* gavelkindmen, which hold none other *gauylekendeys, que ne tenent mes* than tenements of gavelkinde nature, *que tenemenz gauylekendeys,* ought not to come to the common *ne deiuent venir a la commune* summonce of the Eire, but onely by *somonse del Eire, mes ke per* the borsholder, and foure men of the *borgesaldre, et iiij hommes** *de la* borowe: except the townes which *borghe: hors pris les villees que*

Various readings M. S. Linc. Inn.

*A son droit.

† Desouz.

* The words between the stars omitted.

Various readings in Tottel's edit.

ought to aunswere by twelve men in
deiuent responder per xij hommes * en
the Eire. And they claime also, that if
le Eire. Et clament auxi, que sil
any tenant in gavelkinde be attainted
nul tenant en gauylekend seit atteint
of felonie, for which he suffereth
de felonie, per que il suffre
execution of death, the King shall
[a] † *iuyse* * *de mort, eit le Roy*
have all his goods, and his heire forth-
touz ses chateux, e son eir meinte-
with after his death, shall be inherit-
nant apres sa mort, seit enherite
able to all his landes and tenements
de touz ses terres et tenemenz
which he held in gavelkinde in fee,
que il tient en gauylekende en fee,
and in inheritance; and he shall hold
e en heritage; e les tiendra
them by the same services and cus-
per mesmes les seruices et cus-
tomes, as his auncestors held them;
tomes, sicome ses auncestres les tyn-

Various readings M. S. Linc. Inn.

[a] Fuise.

† Iues.

* Perhaps it should be *justice de mort*, for it will be difficult to fix the true signification of any of the other words.

Various readings in Tottel's edit.

[a] Sonde the father to the bough, sond the sonne to the plough.

whereupon it is said in Kentish: "the *dront; dont est dist en Kenteis:*[a] * "þe father to the boughe, and the sonne fader to þe boughe, and þe son to the plough." And if he have a to þe plogh." *Et si il eit* wife, foorthwith be she endowed by *femme, meintenant seit dowe per* the heire (if he be of age), of the *le heir,* [b] † *sil seit dage, de la* one halfe of all the landes and tene- *meytie de touz les terres e tene-* ments, which her husband held of *menz, que son baroun tint de* gavelkind nature in fee, to have and *gauylekend en fee, a auer e* to hold according to the forme here- *a tener solonc la fourme de* after declared. And of such lands *suthdyte. Et de tiels terres* the King shall not have the yeere, *le Roy ne auera an, ne wast,* nor wast, but only the goods, as is *mes tant soulment les chateux, sicome* before said. And if any man of *il est auant dit. Et si nul* gavelkind, either for felonie, or for *gauylekendeis, pur felonie, ou pur*

Various readings M. S. Linc. Inn.

* Son the fader to the bonde, son the son to the londe.

[b] Sil soit del age a aver et tener solonc le fourme *avaunt dit.* Et de celes terres le Roy,&c.(but falsely).

† Sile' soit dage a aver et tenir solonc le fourme *avant dit.* Et de celes terris le Roy,&c.(but falsely).

Various readings in Tottel's edit.

suspicion of felonie, withdraw him
ret de felonie, se suthrei
out of the country, and be demanded
de la [a] *pees, e seit en counte*
in the countie as he ought, and be
demande com il appent, e
afterward outlawed, or put himselfe
puis vtlaghe, ou sil se met
into the holy church, and abjure the
en seinte eglise, et foriure la
land and the realme; the King shall
terre [b] * *oue le reaume; le Roy auera*
have the yeere and the wast of his
lan e le wast [c] † *de ces*
landes, and of all his tenements, to-
terres, et de touz ses tenemenz,
gether with all his goodes and chattels:
ensemblement oue touz ces chateus:
so that after the yeere and the day,
issint que apres lan e le iour, le
the next lord, or lordes, shall have
plus procheyn seig., ou seigneurs, eyent
their eschetes of those lands and tene-
leur eschetes de celes terres e tene-
ments, every lorde that which is
menz, chescun seigneur ceo que de

Various readings M. S. Linc. Inn.

[a] Peace.

[b] *Ove le reaume*, omitted.

[c] De ses tenementes e de ses terres, *ceo que de luy sont tenus*, ensemblement, &c. (but falsely.)

* The words *ove le reaume*, omitted.

† De ces tenementz et de ces terres, *ceo que de lui sont tenus*, ensemblement, &c. (but falsely.)

Various readings in Tottel's edit.

immediately holden of him. And *luy est tenu sans men.* * *Et* they claime also, that if any tenant *clament auxi, que si ascun tenant*

Various readings M. S. Linc. Inn.

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* Mr. Somner (p. 170) gives us from an ancient copy of the *Custumal*, formerly registered in a book belonging to the abbey of St. Austin, Canterbury, another clause, following the words, est de lui tenu sans men, viz.—*E si home ou femme seit feloun de sei mesmes, que il sey mesmes de gre se ocye, le Roy aura le chatteux tuts, et nient le an ne le wast, mes le heir seit tantot enherite sans contredit, kar tout seit il feloun de sey mesmes, il neyt my atteint de felonye.* Thus in English, *And if a man or woman shall be a felon of him or herself, who shall kill him or herself of his or her own accord, the King shall have all the chattels, and not the year nor the waste, but the heir shall immediately inherit without contradiction, for though he or she be a felon of him or herself, he or she is not attainted of felony.* This has been omitted in later copies (as I suppose) because no other than the common law. [See *Rex* v. *Bridger*, 1 Mees. & W. 145.] But I chose to take notice of it, because I have found it to have been formerly disputed, whether one *felo de se* did not forfeit his lands by the custom of Kent.

For, in 55 Hen. 3 (Itin. Kanc., rot. 34, in dorso), in bar of an assize, it is pleaded, that the father of the plaintiff *fecit feloniam de se*, and that the custom of Kent is such, that if

Various readings in Tottel's edit.

in gavelkinde die, and be an inheritour of landes and tenements in gavelkinde, that all his sons shall part that inheritance by equall portions. And if there be no heire male, let the partition be made between the [a] females, even as between brothers. And let the messuage also be departed between them, but the harth for fire shall remain to the youngest sonne, [b]

*en gauylekende murt, et seit inherite de terres e de tenemenz de gavelkinde, que touz ses fitz partent cel heritage per ouele porcioun. Et si nul heir madle ne seit, seit la [a] * partye feit entre les females, sicome entres les freres. Et la mesuage seit autreci entre eux departi, mes le astre demorra all pune, [b] †*

Various readings M. S. Linc. Inn.

[a] Partition.

* Particion.

[b] *Ou al punee* omitted.

† The words *ou al punee* omitted.

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a man *faciat feloniam de se*, his sons can claim nothing in any land whereof he died seized, nor his wife her dower, *et petit quòd inquiratur per viros legales de comitatu. Posteà totus comitatus recordatur, quòd ille qui facit feloniam de se, non forisfacit terram suam.* And thereupon, the plaintiff has judgment to recover his seisin.

Various readings in Tottel's edit.

or daughter: and be the value thereof *ou al punee: e la value seit de ceo* delivered to each of the parceners of *liure a chescun des parceners de* that heritage, from xl feete from *cel heritage, a xl* [a] *pes de* that astre, if the tenement will so *cel astre, si le tenement le peut* suffer. And then let the eldest *suffrir. Et donkz le eyne* [b] * brother have the first choice, and *frere eit la primere electioun, e* the others afterward, according to *les autres apres, per* their degree. Likewise, of houses *degree. Ensement, de mesons* which shall be found in such mes- *que serront trouets* [c] † *en tieus me-* suages, let them be departed amongst *suages, seient departye entre* the heires by equall portions, that *les heirs per ouele porcioun, ceo* is to weete, by foote if need be, *est asauoir, per peies sil est mistier,* saving the couert of the astre, which *sauue le couert del astre, que* shall remain to the youngest son, or *remeynt al pune, ou al punee,*

Various readings M. S. Linc. Inn.

[a] Piece del.

[b] *Frere* omitted.

* Frere omitted.

[c] En ses mains, soient parties enter, &c.

† En ses mesons, soient parties enter, &c.

Various readings in Tottel's edit.

daughter, as is before said: so nevertheless, that the youngest make reasonable amends to his parceners [a] * for the part which to them belongeth, by the award of good men. And of the aforesaid tenements, whereof one only suit was wont to be made before time, be there not by reason of the partition but one sole suite [b] made, as it was before accustomed: but yet let all the parceners make contribution to the parcener which maketh the suite for them. In like sort, let the goods of gauelkinde per-

Various readings M. S. Linc. Inn.

sicome il est auandist: issi que neuertheless, que le pune face quedont, renable gre a ces parceners de la partye que a eux appent, per agard de bone gentz. E des auaunditz tenemènz, dont vn soule sute tant soulement soleit estre feit auant, ne seit per la resoun de la partye fors vn soule sute faite, sicome soleit auant: mes que touz les parceners facent contributioun a celui que face la sute pur eux. Ensement, seient les chateus de gauylekendeys

[a] Reasonable

* *Resonable.*

[b] Particion.

Various readings in Tottel's edit.

sons be parted into three parts, after *parties en treis, apres* the funerals and the debts paied, if *le exequies e les dettes rendues, si* there be lawfull issue in life: so that *il y eit issue mulier en vye: issi que* the dead haue one part, and his *la mort eyt la vne partie, e les* lawfull sonnes and daughters an other *fitz,* [a] * *e les filles muliers lautre* part, and the wife the third part. *partie, et la* † *femme la tierce partie.* And if there be no lawfull issue in * *Et si nul issue mulier en* life, let the dead have the one halfe, *vie ne seit, eit la mort la meite,* and the wife alive the other halfe. *e la femme en vye lautre* [b] *meytie.** And if the heire, or heires, shall be *Et si le heir, ou lez heirs, seit, ou* under the age of fifteen yeers, let the *seyent dedeins le age de xv ans, seit la* nourtriture of them be committed *nouriture de eux baille* by the lorde, to the next of the bloud [c] ‡ *per le seig., al plus procheyn del* to whom the inheritance cannot *sank, a qui heritage ne peut*

Various readings M. S. Linc. Inn.

[a] The words *e les filles* omitted.

* The words *e les filles* omitted.

† Femme en vie la tierce parte.

The words between the stars are omitted.

[b] Partie.

[c] The words *per le seigneur* omitted.

‡ The words *per le seigneur* omitted.

Various readings in Tottel's edit.

descend. So that the lorde take nothing for the committing thereof.

[a] Bailment.

descendre. Issi que le seign. pur le [a] bail rein ne prengne.

Various readings M. S. Linc. Inn.

And let not the heire be married by

[b] Son.

*Et quil ne seit marie per [b] **

* Son.

the lorde, but by his owne will, *le seign., mes per sa volunte demeine,* and by the aduise of his friends, if *et per le conseil de ces amys, sil* he will. And when such heire, or *veut. Et quant cel heir, ou* heires, shall come to the full age of *ceux heirs, sont de plener age de* fifteen yeers, let their lands and *xv auns, seient a eux lour terres, e* tenements be delivered unto them, *lour tenemenz liurés, ensemble-* together with their goods, and with *ment oue lour chateaux, et oue* profits the emprovments of the same lands,

[c] Approwements.

les [c] † enprouemenz de celes terres,

† Approwementz.

remaining above their reasonable

[d] Raisonable.

outre [d] ‡ renable susti-

‡ Resonable.

sustenance: of the which profits *nance: de quel enprouement*

Various readings in Tottel's edit.

and goods, let him be bounde to make aunswere which had the education of the heire, or els the lord, or his heires, which committed the same education. And this is to be understood, that from such time as those heires in gavelkind, be of, or have passed, the age of fifteen yeeres, it is lawfull for them, their lands or tenements to give and sell at their pleasure: saving the services to the chief lordes as is before said. And if any such tenant in gauelkind die, and have a wife that overliveth

Various readings M. S. Linc. Inn.

e chateux, seit tenu a respondre celui qui de [a] * *luy auera la norituré, ou le seigneur, ou ses heyres, que cel norituré auera baillie. Et ceo fet a sauoir, que del houre que ceux heirs gauylekende,* [b] † *seient, ount passe, le age de xv auns, list a eux, lour terres ou tenemenz* [c] ‡ *doner e vendre a lour volunte: sauues les seruices au chief lordes* [d] § *chefz seignorages com il est deuant dit. Et si nul tiel tenant en gauylekend meurt, e eit femme que suruiue,*

[a] Lui avera en noriture, au qui le seygniour et ses heyres cel nouriture avera baillie.

* Lui avera en noreture onke seignour et ses heirs cele noreture avera baille.

[b] Averont passe.

† Averont passe.

[c] Doner *ou* vender.

‡ Doner *ou* vendre.

[d] Lour.

§ Lour.

him, let that wife by and by be endowed (of the one halfe of the tenements whereof her husband died vested and seised) by the heires, if they be of age, or by the lords, if the heires be not of age: so that she may have the one halfe moitie of those lands and tenements, to holde so long as she keepeth her a widow, or shall be attainted of childbirth, after the ancient usage: that is to say, that if when she is delivered of childe, the infant be heard crie, and that the hue and crie be raised, and

*seit cele femme meintenant douue de la meite des tenements whereof her husband died mentz dont son baroun morust vested and seised) by the heires, if [a] * *vestu e seisi, per les heirs, sil seient de age, * ou per les seigneures, si les heirs ne seient pas de age: * issi que ele eyt la meite de those lands and tenements, [b] to holde celes terres e tenemenz, [b] a tener so long as she keepeth her a widow, tant com ele se tyent veue, or shall be attainted of childbirth, ou de enfanter seit atteint, after the ancient usage: that is to per le auncienne vsage: ceo est say, that if when she is delivered of asauoir, que quant ele enfaunte, e childe, the infant be heard crie, lenfant seit oy crier, and that the hue and crie be raised, and [c] † e que le hu e le cry seit leue,*

Various readings in Tottel's edit.

Various readings M. S. Linc. Inn.

[a] The words *vestu e* omitted.

* The words *vestu e* omitted. The words between the stars omitted.

[b] Et tiendra tant come ele se tient veufue ou desenfantee, de enfant soit attaint, &c.

[c] Et le crie

† Et la crie

Various readings in Tottel's edit. soit leve, et la pais se ensemble, &c.

the countrie be assembled and have the view of the childe so borne, and of the mother, then let her lose her dowre wholly, and otherwise not, so long as she holdeth her a widow: whereof it is said in Kentish: "he that doth wende her, let him lendeher." And they claime also, that if a man take a wife which hath inheritance of gauelkind, and the wife dieth before him, let the husband have the one halfe of those lands and tenements whereof she died seised, so long as he holdeth him a widower, without doing any strippe,

e le pais ensemble · e eyent weue de lenfant ensi faunte, e de la mere, . adonks perde son dowere dist en Kenteis: [a] * "ȝe þat hiȝ þenðe her, let him lendeher." *E clament auxi, que homme que prent femme que eit heritage de gauylekend, e la femme murge auant luy, eit le baroun le meite— de celes terres et tenemenz tant come il se tient* [b] *veuers (dont* [c] † *il morust seisei), saunz estrepement,*

[a] Sey is wedne, sey is levedne.

[b] Veufuer.

[c] El.

Various readings M. S. Linc. Inn. soit leve, et la pais se ensemble, &c.

* Seye is wedne, seye ys lenedy.

† Ele.

Various readings in Tottel's edit.

or waste, or banishment, whether *ou wast, ou exile fere, le quel kil* there were issue between them or no: *y eit heir entre eux ou noun:* and if he take another wife, let him *et sil prent femme, trestout* loose all. And if any tenement of *perde. Et si nul tenement de* gauelkinde do escheate (and that *gauylekend eschete (et ceo* escheate be to any lorde which *eschete seit a nul seigneur que* holdeth by fee of hawberke, or by *tiene per fee de hawberk, ou per* cessavit serieancie) by death, or by gaulate *seriauncye) * per mort, ou per gaue-* as is hereafter saide, or be to him *late sicome il est suthdite, * ou li seit* given up rendred by his tenaunt, which before *rendu de son tenant, que de li* held it of him by quite claime thereof *auant le tynt per quite clamaunce de ceo* made, or if his escheate be by gaue- *fete, ou seit sa eschete per [a] * gaue-* late as is hereafter saide, let this *late sicome il est de suthdit, remeyne*

Various readings M. S. Linc. Inn.

* The words between the stars omitted.

[a] Gavelet.

* Gavtlete.

Various readings in Tottel's edit.

land remain to the heires vnpart-
cele terre as heires [a] * *impart-*

[a] Non portables.

able. And this is to be vnderstood,
able. Et ceo fet asauoir, la

where the tenant so rendring, doth
ou le tenant ensi rendant, nule

reteine no seruice to himselfe, but
seruice retent deuers sey, * *sauuet*

The words between the stars omitted.

sauéth neverthelesse to the other
nequedent as autres

lordes, their fees, fermes, and the
seigneurages, fees, fermes, e les

rents wherewith the aforesaid tene-
rentes dont les auant diz tene-

ments of gavelkind (so rendred)
menz de gauylekende ensi rendus

were before charged, by him, or
auant furent charges, per ceux, ou per

them, which might charge them.
*celuy, que le charger poent, ou poeyt.**

And they claime also, that if
E clament auxi, que si nul

withhold
any tenant in gauelkinde reteine his
tenant en gauylekende reteine sa

rent, and his seruices of the tenement
rent, e son seruice del tenement

Various readings M. S. Line. Inn.

* Noun portables.

The words between the stars omitted.

Various readings in Tottel's edit.

which he holdeth of his lord, let the lord seeke by the award of his court, from three weekes to three weekes, to finde some distresse upon that tenement, vntill the fourth court, alwaies with witnesses: and if within that time, he can finde no distresse in that tenement, whereby he may have iustice of his tenant, then, at the fourth court, let it be awarded, that he shall take that tenement into his hande in the name of a distresse, as if it were an oxe, or a cow, and let him keepe it a yeere and a day in his hand

Various readings M. S. Linc. Inn.

quil tient de son seigneur, querge le seign. per agard de sa court, de treys semeynes en treys semeynes truue destresse sur cel tenement, tant que a la quart court, a totefet per tesmoynage: et si dedens cel temps, ne trusse destresse en cel tenement, per queux il puisse son tenant iustiser, donc, a la quart court, seit agard, quil pregne cel tenement en sa mein en noum de destresse, ausi come boef, ou vache, e le tiene vn an e vn iour en sa mein

Various readings in Tottel's edit.

without manuring it: within which
[a] * *sance meyn ouerir: dens quel*
terme, if the tenaunt come, and pay
terme, si le tenant vent, e rend
his arrerages, and make reasonable
ses arrerages, e [b] *feit renables*
amends for the withholding, then let
amendes † *de la detenue, a donc*
him have and enjoy his tenement as
eit, e ioise son tenement sicom
his auncestors and he before held it.
ses auncestors [c] ‡ *e ly auant le tyndront.*
And if he do not come before the yeere
[d] *Et sil ne vent* § *deuant lan*
and the day past, then let the lord
[e] *e le iour passe, donc* [e] ‖ *auge le seigneur*
go to the next countie court with the
al prochein [f] *counte suiant oue*
witnesses of his owne court, and
tesmoynage de sa court, e face la
pronounce there this processe to
pronuncier cel proces pur
have further witnesse. And by the
tesmoynage auer. Et per
award of his court (after that countie
agard de sa court, apres ceo
court holden), he shall enter, and
[g] *counte tenue, entra, e*

Various readings M. S. Linc. Inn.

[a] Sans meinour.

[a] *Sanz mainnour.

[b] Face raisonables amendes de la dette.

† De la dette.

[c] Les teignont.

‡ Les tenoient.

[d] Dedeyns.

§ Dedeins.

[e] Eyt.

‖ Aille.

[f] Courte (but falsely.)

[g] Court.

Various readings in Tottel's edit.

[a] Mainera.

manure in those lands and tene-
[a] * *meynouera en celes terres e tene-*
ments as in his own demeanes. And if
menz sicome en son demeyne. Et si
the tenant come afterward, and will
le tenant vent apres, e voille
rehave his tenements, and hold them
ces tenemenz reauer, e tener si-
as he did before, let him make agree-
come il fist deuaunt, face gree
ment with the lord, according as it is
al seigneur, sicome il est
anciently said:
auncienement dist:

Various readings M. S. Linc. Inn.

* Meignera.

* "Nezhe ſype ſelde, anð nezhe ſyp zelde:
Anð þiþ þonð þoþ þe þeþe, eþ he bicome healdeþ."

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* *i. e.* Hath he not since anything given, and hath he not since anything paid? then let him pay five pounds for his were, or amercement, before he become tenant or holder again.

But some copies have the first verse thus, *Nigon sithe selde, and nigon sithe gelde, i. e.* Let him nine times pay, and nine times repay. (Lamb. Peramb. 553.)

Various readings in Tottel's edit.

[a] *The words* aussi il cleyment, *omitted, and the sentence runs thus,* Ne per pueur del seigniour ne des baillifes encountre sa volunte sans briefe le Roy ne soit mis a serment sinon pour fealtie, &c.

Also they claim, that no man ought [a]* *Aussi il cleyment, que nul homme deit* to make oath upon a book (neither by *serment sur liure fere,* *per* distresse, nor by the power of the lord, *destress, ne per poer de seigneur,* nor of his bailife) against his will, *ne de baylif encountre sa volunte,* without the writ of the King (unless *saunz bref le Roy (sinon* it be for fealty to be done to his lord), *per feaute fere a son seigneur),* but only before the coroner, or other *meske per devaunt coronner, ou auter* minister of the King, as hath royal *minister le Roy, * qui real poer eyont* power to enquire of trespass commit- *de enquirer de trespas fet en-*

Various readings M. S. Linc. Inn.

* *The words* aussi il cleyment *omitted, and the sentence runs,* Ne pur poure, &c., *as in Tottel's edition.*

The words between the stars omitted.

The words between the stars omitted.

Tottel's edition reads these verses,

Neighe sithe yeld, neighe sithe gelt,
And yef [*i. e.* give] *you for the were, then is he holder.*

And the M.S. of Lincoln's Inn still differently,

Nenghe syche zelde, venge site geld,
And xis pund for the were, yen is he heldere.

ted against the crown of our lord the King. And they claime also, that every Kentish man may essoin another, either in the King's court, or in the county, or in the hundreth, or in the court of his lord, where essoine lieth, and that as well in the case of commune sute as of plea. Moreover, they claim by an especial deed of King Henrie the Third, father of King Edward which now is (whom God save), that of the tenements which are holden in gavelkinde there shall no battail be joined, nor grand assise taken

countre la coronne nostre seigneur le Roy. E cleyment auxi, que chacun Kenteys put autre assonier, [a]* en la court le Roy, en counte, en hundreth, e en la court son seigneur, la ou assoigne gist, aussi bien de commune sute come [b]† de play. Estre, ceo il cleyment per especial fet le Roy Henrie, pere le Roy Edward * que ore est, que Dieu garde, * que de tenementz que sont tenus en gauylekende ne seit prise [c]‡ battaille, ne graund assise per*

Various readings in Tottel's edit.

[a] *A seigniour* added.

[b] De common plee.

The words between the stars omitted.

[c] The words

Various readings M. S. Linc. Inn.

* *A seignour* added.

† De commune plea.

The words between the stars omitted.

‡ The words

Various readings in Tottel's edit. *battaille ne* omitted.

by xii knights, as it is used in other
xii chiuallers, sicome aillours est prise
places of the realme, that is to weet,
en le reaume, ceo est a savoir,
where the tenant and demandant hold
la ou tenant e le demaundant tenent
by gavelkinde: but in the place of
per gauylekende: mes en lu de
these graund assises, let juries be taken
ces graundes assises, seient prises jurees
by xii men being tenants in gavelkind:
per xii homes tenantz en gauylekend:
so that four tenants of gavelkinde
* *issi que quatre tenantz de gauilekend*
choose xii tenants of gavelkinde to be
elisent xii tenantz de gauylekende
jurors. And the charter of the King
iurours. E le chartre le Roy
of this especialtie is in the custody
de ceste especiaute est en la garde
of Sir John of Norwood, the day of
[a] Norward. *Sire Johan de* [a] *Norwode, le jour de*
St. Alphey, in Canterburie, the yeare
[b] Elphe. *S.* [b] † *Elphegh, en Canterbyre,* [c] ‡ *le an*
[c] Lan du reigne le roy Edward xxi. of King Edward, the sonne of King
le Roy Edward, le fiz le Roy

Various readings M. S. Linc. Inn. *battaille ne* omitted.

The words between the stars omitted.

† Elphe.

‡ Lan le reigne le roy Edward xxi.

Various readings in Tottel's edit.

Henrie, the xxi. * These be the usages of gavelkind, and of gavelkinde men in Kent, which were bekendeys before the Conquest, and at the Conquest, and ever since till now.

Various readings M. S. Linc. Inn.

Henrie, xxi. Ces sont les usages de gauylekend, e de gauylekendeys en Kent, que furent deuaunt le Conquest, e en le Conquest, e totes houres ieskes en ca.

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* Neither the M.S. of Lincoln's Inn, nor Tottel's edition, have this conclusion, and it is repugnant to the last privilege, which is claimed under the charter of King Henry 3, [rot. claus. 16, m. 14.]

SELECTION

OF

PRECEDENTS OF FEOFFMENTS BY INFANT HEIRS IN GAVELKIND *(a)*.

No. I.

FEOFFMENT BY AN INFANT HEIR TO A PURCHASER IN FEE, WITH POWER OF ATTORNEY TO RECEIVE SEISIN. (VARIATION, WHERE HIS MOTHER CONCURS TO EXTINGUISH HER DOWER.)

THIS INDENTURE, made the — day of —, 18—, BETWEEN *(Feoffor)* of, &c., of the first part, [*(Feoffor's mother)* of, &c., widow, of the second part,] *(Purchaser)* of, &c., of the third part, and *(Attorney to receive seisin)* of, &c., of the fourth part. Date. Parties.

(*a*) Inserted by the Editor.

Recital of ancestor's death.

WHEREAS (*Feoffor's father*) late of, &c., died intestate on or about the — day of —, 18—, seized in fee of the hereditaments hereinafter described, and intended to be hereby granted and enfeoffed, leaving the said [(*Feoffor's mother*) his widow, and] (*Feoffor*) his only son and heir-at-law and in gavelkind, him surviving.

That feoffor is an infant.

AND WHEREAS the said (*Feoffor*) is an infant, but he has attained the age of fifteen years and upwards, he having been baptized at —, on the — day of —, 18—.

Of custom authorizing the conveyance by feoffment.

AND WHEREAS the said hereditaments are situate in the County of Kent, and are descendible according to the custom of gavelkind; and by the said custom, it is lawful for an heir, having attained the age of fifteen years (*b*), to enter upon the lands which he takes by descent (*c*), and there by delivery of seisin thereof, to convey the same as fully and effectually as if of the age of twenty-one years.

Of contract to sell.

AND WHEREAS the said (*Feoffor*) has contracted with the said (*Purchaser*), for the absolute sale to him of the said hereditaments with their appurtenances, free from all incumbrances (except land tax and quit rents, if any, payable

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(*b*) This custom extends to a female heir. See ante, p. 117.

(*c*) See ante, p. 134, and note (*o*).

in respect thereof),for the sum of £—. [And the said (*Feoffor's mother*) being entitled to dower out of the said hereditaments and premises, has agreed to concur in these presents for the purpose of extinguishing the same.]

Now this Indenture witnesseth, that in pursuance of the said contract, and in consideration of the sum of £— sterling, paid by the said (*Purchaser*) to the said (*Feoffor*) upon or before the execution of these presents, the receipt whereof the said (*Feoffor*) doth hereby acknowledge (*d*), and therefrom doth hereby release the said (*Purchaser*), his heirs, executors, administrators, and assigns. He, the said (*Feoffor*), Hath given, granted, and enfeoffed, and by these presents Doth confirm, [And the said (*Feoffor's mother*) for the purpose of extinguishing her right of dower in the said hereditaments, Doth hereby release and quit claim,] unto the said (*Purchaser*) and his heirs, All &c., [*parcels.*] And all rights, members, and appurtenances, to the same belonging, or reputed to belong. And all the estate, right, title, and interest, both legal and equitable, of him [them] the said (*Feoffor*)

Testatum.

Consideration.

Receipt.

Conveying words.

Parcels.

All-estate clause.

(*d*) An infant being entitled by the custom, to enfeoff his lands on attaining the age of fifteen years, it seems necessarily to follow, that he may receive and give a valid discharge for the purchase money. (See the opinion of Lord Kenyon, cited in *Crewe* v. *Dicken*, 4 Ves. 99.)

All-deeds clause.

[and (*Feoffor's mother*) respectively] therein. TOGETHER with all deeds, and writings, relating to the title thereof, now in the custody or power of the said (*Feoffor*) [and (*Feoffor's mother*), or either of them,] or which he [they or either of them] can obtain without suit at law, or in equity.

Habendum, to purchaser in fee.

TO HAVE AND TO HOLD the said hereditaments and premises hereby granted and enfeoffed with their appurtenances, UNTO, and to the use of the said (*Purchaser*), his heirs and assigns for ever.

Declaration to debar widow of dower.

AND the said (*Purchaser*) hereby declares, that in case he shall leave a widow, she shall not be entitled to dower out of the said hereditaments and premises (*e*).

Letter of attorney to receive seisin.

AND the said (*Purchaser*) DOTH by these presents, nominate and appoint the said (*Attorney to receive seisin*), his attorney, for him, and in his name, to accept, and take possession and seisin, of all the said hereditaments and premises hereby granted and enfeoffed, or some part thereof, in the name of the whole, from the said (*Feoffor*). To HOLD according to the tenor and effect of these presents (*f*). IN WITNESS, &c.

Hiis testibus.

(*e*) No warranty can be annexed to a feoffment by an infant of gavelkind lands. See ante, p. 133.

(*f*) If this clause be inserted, the feoffment will require a deed stamp in addition to the *ad valorem* duty; but the purchaser may of course receive seisin in person.

MEMORANDUM OF LIVERY OF SEISIN TO BE INDORSED ON THE PRECEDING DEED OF FEOFFMENT. (VARIATION, WHERE THE PREMISES ARE LET.) (*g*)

Memorandum of livery of seisin, &c.

BE IT REMEMBERED that on the day of the date of the within written indenture (*or any other day as the case may be*) (*h*), the within named (*Feoffor*) in his proper person (*i*), entered into and upon the within described hereditaments and premises, and [*if the premises are let, omit* "and", *and add*, "with the consent of the within named — the tenant [*or*, tenants] in possession (testified by his [*or*, their] signing this memorandum (*j*) without prejudice to his tenancy [*or*, their respective tenancies),] and took peaceable possession and seisin of the said hereditaments and premises, and with the like consent"] delivered peaceable possession and seisin thereof, unto the

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(*g*) As to how livery of seisin is usually made, see Woodf. Landl. & T. p. 126, et seq., 7th edit.

(*h*) The livery of seisin need not be made on the day of the date of the deed. (See *Roe* d. *Heale* v. *Rashleigh*, 3 Barn. & Ald. 156.)

(*i*) See ante, p. 118.

Lessee should subscribe memorandum.

(*j*) Where the lands are in the occupation of tenants, whether holding by lease or tenancy from year to year, it seems to be a prudent precaution, to make them subscribe the memorandum of livery, in order to prevent any question as to their assent having been obtained. (4 Jarm. Convey. by Sweet, p. 69.)

within named (*Attorney*), as Attorney for the within named (*Purchaser*), (*or*, (*Purchaser*) in person, *as the case may be.*) [*Where part of the premises is in the occupation of one tenant, and part of another, add these words*, "A separate seisin having been delivered of the hereditaments and premises in the tenure or occupation of (*one tenant*), and of the hereditaments and premises in the tenure or occupation of (*the other tenant*) respectively" (*k*).] To HOLD unto the said (*Purchaser*), and his heirs, according to the tenor and effect of the within written indenture. And that such seisin was accepted by the said (*Attorney*) [*or*, (*Purchaser*)] accordingly in our presence. AND that on the same day, the within mentioned sum of £ —, was paid into the proper hands of the said (*Feoffor*) in our presence (*l*).

Separate seisin for distinct parts.

[TENANTS NAMES.] (WITNESSES.)

(*k*) See Woodfall's Landl. & Tenant, p. 127, 7th edit.

(*l*) It is usual to add to the memorandum of livery of seisin, an attestation that the purchase money has been paid to the infant, instead of indorsing a separate receipt for it.

No. II.

FEOFFMENT BY AN INFANT HEIR OF HIS UNDIVIDED MOIETY OF PREMISES TO A PURCHASER IN FEE.

THIS INDENTURE, made the — day of —, 18—, BETWEEN (*Feoffor*) of, &c., of the one part, and (*Purchaser*) of, &c., of the other part. Date. Parties.

WHEREAS (*Feoffor's Father*) late of, &c., died intestate on or about the — day of —, 18—, seized in fee of the lands and hereditaments hereinafter described, which upon his decease, descended to the said (*Feoffor*), and —, as his only sons and coheirs by the custom of gavelkind. Recital of death of ancestor.

AND WHEREAS by the said Custom, heirs in gavelkind having attained the age of fifteen years, are enabled to enter upon the lands so descended to them, and there by delivery of seisin thereof, to convey the same as fully and effectually as if of the age of twenty-one years. Of custom authorizing the conveyance by feoffment.

AND WHEREAS the said (*Feoffor*) is above the said age of fifteen years, that is to say, of the age of — years, or thereabouts, he having been baptized at —, on the — day of —, 18—. Of feoffor's age.

Of contract to purchase.

And whereas the said (*Purchaser*) has contracted with the said (*Feoffor*), for the purchase of his undivided moiety or equal half part of and in the lands and hereditaments hereinafter described, free from incumbrances (except land-tax and quit-rents, if any), for the sum of £—.

Testatum.

That in pursuance of the said custom,

Now this Indenture witnesseth, that in pursuance of the said custom, and in consideration of the sum of £— sterling, paid by the said (*Purchaser*) to the said (*Feoffor*) upon or before the execution of these presents, the receipt whereof the said (*Feoffor*) doth hereby acknowledge, and therefrom doth hereby release the said (*Purchaser*), his heirs, executors, administrators, and assigns. He, the said (*Feoffor*), Hath given, granted, and enfeoffed, and by these presents Doth confirm, unto the said (*Purchaser*) and his heirs, All that the undivided moiety or equal half part or share, and all other the share and interest of him the said (*Feoffor*) of and in, All that, &c., [*describe parcels.*] And of and in the rights, members, and appurtenances, to the same belonging, or reputed to belong. And the reversion and reversions, remainder and remainders, yearly, and other rents, issues, and profits of the said moiety and premises. And all the estate, right, title, and interest, of him the said (*Feoffor*) of and in the said moiety and premises. And all deeds, and writings, relating to the title

the heir grants and enfeoffs.

Parcels.

All-estate clause.

thereof, now in the custody or power of the said (*Feoffor*), or which he can obtain without suit at law, or in equity. All-deeds clause.

To HAVE AND TO HOLD the said undivided moiety or equal half part or share, and other the share and interest expressed to be hereby granted and enfeoffed, of and in the said lands and hereditaments with their appurtenances, UNTO and to the use of the said (*Purchaser*), his heirs and assigns for ever. IN WITNESS, &c. Habendum to the use of the purchaser in fee. Hiis testibus.

MEMORANDUM OF LIVERY OF SEISIN AND ATTESTATION TO BE INDORSED ON THE PRECEDING DEED.

MEMORANDUM, that on the day and year first within written, the within named (*Feoffor*) in his proper person, entered upon the within described lands and hereditaments, and delivered peaceable possession and seisin of his within mentioned undivided moiety or half part thereof, unto the within named (*Purchaser*), in his own proper person; To HOLD unto the said (*Purchaser*), and his heirs, according to the tenor and effect of the within written indenture, in our presence. And that on the same day, the within mentioned sum of £—, was paid into the proper hands of Memorandum of livery of seisin, &c.

the said (*Feoffor*). And thereupon he signed, sealed, and delivered, as his act and deed, the within written indenture, in our presence.

(SUBSCRIPTION OF WITNESSES, &c.)

No. III.

FEOFFMENT BY AN INFANT HEIR OF HIS UNDIVIDED THIRD PART OF PREMISES TO HIS TWO BROTHERS WHO ARE OF AGE, AND WHO BY THE SAME DEED CONVEY THE ENTIRETY OF THE SAID PREMISES TO A TRUSTEE, TO SUCH USES AS THEY SHALL APPOINT; THE MOTHER CONCURRING TO RELEASE HER DOWER *(m)*.

THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B., of, &c., of the first part, C. D., of, &c., and E. F., of, &c., of the second part, G. H., of, &c., widow, of the third part, and (*Trustee*), of, &c., of the fourth part. Date. Parties.

WHEREAS (*the Father*) died intestate on or about the — day of —, 18—, seized in fee of the hereditaments hereinafter described, and intended to be hereby granted and enfeoffed, leaving the said G. H., his widow, and the said Recital of death of ancestor.

(*m*) This deed will require a 35s. stamp in addition to the ad valorem duty.

A. B., C. D., and E. F., his three only sons and coheirs in gavelkind him surviving. (*Recite, that A. B. is an infant, and that the premises are in Kent, ut ante, No.* 1.)

Of contract to purchase.

And whereas the said C. D., and E. F., have contracted with the said A. B., for the purchase of his undivided third part or share, of and in the hereditaments hereinafter described, free from incumbrances, for the sum of £—.

Of agreement to convey to uses.

And whereas the said A. B., has at the request of the said C. D., and E. F., agreed to concur with them in conveying the entirety of the said hereditaments, to the uses hereinafter declared concerning the same. And the said G. H. being entitled to dower out of the said hereditaments, has, at the request of the said A. B., C. D., and E. F., consented to release the same from all manner of dower and freebench of her the said G. H. therein.

That the mother being entitled to dower consents to release the same.

Testatum.

Now this indenture witnesseth, that in pursuance of the said contract, and in consideration of the sum of £— sterling to the said A. B., paid by the said C. D., and E. F., upon or before the execution of these presents, in equal shares and proportions, in full for the absolute purchase of the fee simple and inheritance of his undivided third part or share in the hereditaments hereby granted and enfeoffed, the receipt whereof the said A. B. doth hereby acknowledge, He,

Consideration.

Receipt.

the said A. B., HATH granted and enfeoffed, and by these presents DOTH confirm; AND the said C. D., and E. F., DO, and each of them DOTH hereby grant and convey; AND the said G. H., for the purpose of releasing her right of dower in the said hereditaments, DOTH hereby release and quit claim, unto the said (*Trustee*) and his heirs, ALL &c. (*parcels.*) AND all rights, members, and appurtenances, to the same belonging, or reputed to belong. AND all the estate, right, title, and interest, both legal and equitable, of them the said A. B., C. D., E. F., and G. H., respectively therein.

Conveying words.

Parcels.

General words.

TO HAVE AND TO HOLD the said hereditaments and premises expressed to be hereby granted and enfeoffed with their appurtenances, UNTO the said (*Trustee*), and his heirs, TO SUCH USES, upon such trusts, and in such manner, as the said C. D., and E. F., shall jointly at any time or times by deed or deeds appoint; AND in default of, and until such appointment, AS to one full equal undivided moiety or half part (the whole into two equal parts or shares to be divided) of and in the said hereditaments and premises, or such of them as shall not be otherwise jointly appointed in manner aforesaid; TO SUCH USES, upon such trusts, and in such manner, as the said C. D. shall at any time or times by deed or deeds appoint; AND in default of, and until

Habendum.

Uses to bar dower.

such appointment, To THE USE of the said C. D. and his assigns during his life, without impeachment of waste; after AND the determination of that estate by any means in his lifetime, To THE USE of the said (*Trustee*) his executors and administrators during the life of, and IN TRUST for the said C. D. and his assigns; AND after the determination of the said hereinbefore lastly limited estate, To THE USE of the said C. D., his heirs and assigns for ever. AND as to the remaining one full equal undivided moiety or half part thereof; To SUCH USES, upon such trusts, and in such manner, as the said E. F. shall at any time or times by deed or deeds appoint; AND in default of, and until such appointment, To THE USE of the said E. F. and his assigns during his life, without impeachment of waste; AND after the determination of that estate by any means in his lifetime, To THE USE of the said (*Trustee*) his executors and administrators during the life of, and IN TRUST for the said E. F. and his assigns; AND after the determination of the said hereinbefore lastly limited estate, To THE USE of the said E. F., his heirs and assigns for ever. IN WITNESS, &c.

Hiis testibus.

MEMORANDUM OF LIVERY OF SEISIN AND ATTESTATION TO BE ENDORSED ON THE PRECEDING FEOFFMENT.

Memorandum of livery of seisin, &c.

MEMORANDUM, that on the day and year first within written, the within named (*Feoffor*) in his proper person entered upon the within described hereditaments, and delivered peaceable possession and seisin of his within mentioned undivided third part or share thereof unto the within named (*Trustee*). TO HOLD unto the said (*Trustee*) and his heirs, to the uses within mentioned, and according, &c. (*ut ante, No.* 2.)

(SUBSCRIPTION OF WITNESSES, &c.)

APPENDIX.

EXTRACT FROM THE THIRD REAL PROPERTY REPORT RELATING TO THE CUSTOM OF GAVELKIND (*a*).

Custom of gavelkind proposed to be abolished.

It prevails over nearly the whole of Kent, and over copyholds in various parts of the kingdom.

Is attended with inconvenience.

Peculiarities of this custom.

After very mature deliberation, we are of opinion that the custom of Gavelkind should be abolished.

This custom prevails with respect to socage lands, over almost the whole of the county of Kent, and in a qualified manner, over copyhold lands in various parts of the Kingdom. It is attended with many serious practical inconveniences, which do not admit of an effectual cure, except by its abolition.

The principal peculiarities which distinguish socage lands subject to the custom of Gavelkind, from free and common socage, are:—1. That the land descends to all males in equal degree, in equal shares.—2. That the husband is tenant by the curtesy of his deceased wife's land, whether there were issue born alive or not.—3. That the widow is dowable of one-half, instead of a third.—4. That an infant may alien by feoffment at the age of fifteen.—5. That upon a conviction of felony, there is no escheat by reason of corruption of blood.

(*a*) Made in 1832.

If any persons contend that Gavelkind is preferable to free and common socage, as it now subsists, they ought to argue for its extension over the whole realm; for there is nothing in the situation or circumstances of the county of Kent, which renders the custom peculiarly adapted to that district.

Corruption of blood now saved upon attainder, except in cases of treason, petit treason, and murder.

By stat. 54 Geo. 3, c. 145, corruption of blood is now invariably saved upon attainder for felony, except in cases of treason, petit treason, and murder.

The only peculiarities of gavelkind substantially continuing, are those respecting descent, curtesy, dower, and alienation.

The peculiarities of Gavelkind which substantially continue, respect only descent, curtesy, dower, and alienation. The three last may be speedily disposed of; no one will probably contend, that for these alone, the county of Kent should be under a different system of law from the rest of England.

Alterations recommended in first Report in regard to curtesy and dower.

In our first Report we expressed an opinion, that the husband should be entitled to be tenant by the curtesy, whether there were issue or not; and we proposed that this should become the general law of the land. We likewise, in the same Report, suggested several new regulations as to the right to dower; and these, if approved of, ought to be generally adopted (*b*). With regard to the proportion of the husband's lands to be enjoyed by the wife, we are not aware of any reason why it should be different in different counties.

As to the power to alien at fifteen.

The power of aliening land at the age of fifteen is, perhaps, defensible as an expedient for palliating the extreme inconvenience which is felt in making out titles to Gavelkind lands, on account of the frequency of descent to infant heirs. In any other view, it is an absurd exception to the wise rule of law for the protection of minors, that every contract entered into by a person under twenty-one years of age, unless for necessaries, is absolutely void.

As to the rule of descent.

The expediency of preserving Gavelkind tenure must rest upon its peculiar rule of descent.

Political considerations connected with it.

If the subject were treated on political ground, two questions present themselves. 1. *Rebus integris*—is this a

(*b*) See accordingly, the statute 3 & 4 Will. 4, c. 105.

good rule of descent? 2. If not, is there now any serious objection to its abolition?

The Gavelkind rule of descent has neither the advantages of primogeniture, nor of equal partibility.

If it were allowed to take effect independently of settlements and wills, it must, in a few generations, break down ancient families, and cause a subdivision of the land unfavorable to agriculture, and to every sort of improvement. In the meantime, the daughters would be left wholly unprovided for. It would not be the peculiar duty of the eldest brother, to whom no especial favour is shewn, to provide for them; and they would be deprived of the consequence they might have enjoyed in society, had the family estate remained entire under one head.

It appears by the examinations taken before us, that Gavelkind descent is generally controlled by settlements and wills, which shows that, in truth, it does not peculiarly suit the necessities and inclinations of the owners of the soil. The distribution of property, which, in the majority of cases, a prudent owner would himself direct, must be considered the proper distribution to be made upon intestacy by the law.

Mischiefs attending this mode of descent.

But, independently of political considerations, there are mischiefs attending this mode of descent, which induce us to recommend its abolition.

In case of an intestacy, no sale nor partition, nor lease of the estate can be made, until the youngest son can execute a conveyance.

When an intestacy of the owner of an unsettled estate held in Gavelkind does happen, it sometimes occasions great inconvenience. It is often important to some of the sons to have their shares converted into money, in order to enable them to embark in trades or professions. In France and other countries, where the law of equal partibility is established, a power is given, on the death of the ancestor, to sell or divide the estate; but, by the custom of Gavelkind, each heir takes, as copartner, an undivided share; and no sale nor complete partition, nor even a valid lease of the estate, can be made, until the youngest son attains the proper age to execute a conveyance (*c*).

(*c*) On the death of a mortgagee in fee of gavelkind lands intestate,

Titles are renderedinlricate, and dealings with the property are retarded or impeded on account of the subdivision of the land.

Titles are frequently rendered intricate by the land being frittered into shares, and errors are liable to arise in assurances of the shares. Where there have been several descents or intricate transactions, parties frequently mistake the amount of their shares. It has been proved before us, that instances not unfrequently occur in which, from the minority, or foreign residence, or embarrassed title of some of the parceners, or from the unwillingness of some to concur in the sales or other dispositions of the property, dealings with it are expensive, difficult, productive of litigation, or impracticable, and the shares of the parceners able and willing to dispose of them, are greatly reduced below their intrinsic value.

A conveyancer of the first eminence, to a question respecting the operation of the custom of Gavelkind, answered, "I have more than once had titles before me, in "which it was almost impossible to ascertain with accuracy "how far the estate was divided. I know it did come to "half a seventy-second in one instance, and it was amaz- "ingly complicated. I have had several times great diffi- "culty in deducing the title, on account of the subdivisions "of the estate. I had one instance, in which there were "twenty-nine parties interested in property that was not "worth above £300."*

These inconveniences more frequently occur in the descent of trust estates.

These inconveniences necessarily occur more frequently, and in greater aggravation, in the descent of trust estates, as to which there is great danger of intestacy, and great difficulty after a considerable lapse of time in tracing the pedigree of a family not having any beneficial interest in the estate.

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leaving several coheirs, some, or all of whom are infants, no reconveyance of the legal estate can be obtained until all the coheirs have attained their majority, without a petition being presented to the Court of Chancery for that purpose. (See stat. 13 & 14 Vict. c. 60, sec. 7; *Re Kent*, 8 Law Jour. (N.S.) 169 Ch.; 1st Rep. Real Prop. Com. p. 168. Exam. of J. J. Park, Esq.; 2 Jur. 26; and note (*k*), ante, p. 46.)

* See Appendix to 1st Report, p. 270. Examination of A. R. Sidebottom, Esq.

Palliations suggested, but which have been rejected.

Palliations have been suggested to us, which, after deliberation, we have been obliged to reject. As to trust estates, it has been proposed that they should descend to the eldest son according to the rules of the common law, or that one of the co-heirs in Gavelkind should be empowered to convey the whole interest. But questions would arise, whether the case were or were not, one of naked trust; and if one co-heir in Gavelkind were allowed to convey the entirety, there could be no certainty (at least without the establishment of a General Register) that there has not been a prior conveyance by another of the co-heirs, to say nothing of the objection to there being two modes of descent and alienation for the same land.

Some have proposed, that there should be a power given to every tenant in fee of Gavelkind land, by an instrument to be enrolled, to declare the land disgavelled; but there is great reason to fear, that whatever means should be used for preserving evidence of the identity of the lands, this power would, in the end, only aggravate the evil, by introducing an increased uncertainty in determining what lands are disgavelled, and what remain subject to the custom. Seven Acts of Parliament for disgavelling particular estates have passed, and have produced, and are still likely to produce very great inconvenience. The lands thereby disgavelled are not set out by metes and bounds, and are only designated by the names of the owners, at whose instance the Acts were passed. In the great majority of instances, the evidence necessary to identify the lands is utterly gone, and they have returned to the custom of Gavelkind, although in some cases, if their identity could be proved, they might now be claimed by the common law heir (*d*).

A total abolition of the custom recommended.

A total and simultaneous abolition of the custom appears the most simple and effectual remedy; and, provision being made for existing interests, and time being given to make the dispositions of property which will become necessary in consequence of the new law, we are not aware that

(*d*) See ante, note (*j*), p. 43.

it would do any injustice. No individual would be deprived of any interest in the land which he now enjoys, and the owner of an estate might settle or devise it in any manner he might think proper.

Remarks on the supposed predilection of the inhabitants of Kent for the custom.

It is said, that the inhabitants of Kent have a strong predilection for the ancient custom for which their county has been remarkable.

Though much regard is due from the legislature to the feelings of those whose interests are to be dealt with, yet, this principle is not to be put in competition with a certain and considerable public good. The feeling in this case probably arose, from comparing Gavelkind in former times with the tenure which would have been substituted for it, instead of comparing it with free and common socage in its improved state, and must therefore be allowed to have now the character of prejudice.

Questions likely to increase as to what lands in Kent are exempt from the custom.

It is material to observe, that there appears to be a growing danger of questions arising as to what lands in Kent are exempt from the custom of Gavelkind. A gentleman of great eminence at the bar, who has become a purchaser of large estates in Kent, being asked whether there be any prevailing uncertainty on the subject, says, "I think "it very probable that questions may arise upon the subject; "you find it generally laid down, that all lands in Kent are "Gavelkind, and that therefore, no great inconvenience "arises; it must be very clearly proved they are not Gavel-"kind, and it is said such proofs cannot be given. I bought "an estate the other day, where it was perfectly clear it "was not Gavelkind. I have purchased three estates in "Kent, where I am perfectly satisfied none of them are of "gavelkind tenure; and now the records are thrown open "by the Parliamentary Commissioners, I have no doubt "many more such will be found." He afterwards goes on to state, that he has no doubt that some lands in Kent were held *in capite*, and never were Gavelkind, and that there are many monastery lands in the County which were held in Frankalmoign, and which may not be Gavelkind (*e*). He

(*e*) See ante, p. 34, and note (*e*).

adds, that on a purchase of land in Kent, there is an additional expense in ascertaining whether it be Gavelkind or not.*

A recent case was proved to us, in which a regular Gavelkind title was shewn to lands in Kent; but the name of a person mentioned in one of the disgavelling Acts appearing in the abstract, inquiries were made to ascertain whether the lands might not have been disgavelled; and, by means of a county history, and an *inquisitio post mortem* it was ascertained, that they had descended on the death of the person named to his common law heir. They had afterwards been treated as Gavelkind, and a legal estate being outstanding, the Gavelkind heirs (who were infants) were declared to be infant trustees within the statute of Anne, and conveyed accordingly; each conveying only his share. The discovery induced counsel to treat the land as disgavelled, and to require a conveyance of the entirety from the common law heir. This occasioned a new application to the Court of Chancery, the heir having died leaving an infant son, who conveyed under the order of the Court.

No lapse of time or adverse possession can alter the tenure; and where, from the inspection of ancient records, which have recently become more accessible, it shall appear that lands long treated as Gavelkind had once been held *in capite*, or disgavelled, the Gavelkind title can only be supported by resorting to the fiction of gavelling or regavelling Acts, now lost, having been passed by the Legislature *(f)*.

Proposal for an act to disgavel the whole

The true, simple, and effectual remedy, seems to us to be, to pass an Act to disgavel the whole County; and, for the

* See Appendix to 1st Report, p. 228. Examination of John Bell, Esq.

(f) The statute of limitations (3 & 4 Will. 4, c. 27), renders it now unnecessary to resort to any such fiction; for, although no length of desuetude will alter the tenure of gavelkind land, and on usage will restore the ancient tenure of land which has once been disgavelled, yet the claim of any particular heir may at all times be barred by adverse possession under the statute of limitations. (See 1 Byth. Convey. by Sweet, 136.)

county, and to declare that all freehold lands within it shall be held in free and common socage, subject to the ordinary rules respecting curtesy, dower, alienation, and descent.

purpose of quieting all questions whether any of the peculiar customs prevailing in the County depend upon Gavelkind, to declare that all the freehold lands within the County shall be held in free and common socage, subject to the same rules as other free and common socage lands respecting curtesy, dower, alienation, and descent.

Thus, by abolishing the custom of Gavelkind, and subjecting all freehold land in Kent to all the incidents of ordinary socage tenure, a great deal of old law will be taken away, without any danger of new questions arising. Alterations in jurisprudence must always be proposed with anxiety, when they introduce new texts admitting of contrary constructions ; but an amendment which abrogates an old head of law, and introduces no new one, is a certain good.

Gavelkind mode of descent also proposed to be abolished, with respect to copyhold lands throughout the kingdom.

On the same principles, we are of opinion that the mode of descent according to the custom of Gavelkind, which prevails over copyhold lands in various parts of the Kingdom, should likewise be abolished (*g*).

(*g*) See accordingly, the statute 15 & 16 Vict. c. 51, sec. 34, ante, p. 20, n. (*a*).

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